

Office of Attorney General



OPEN RECORDS MANUAL

2006 Edition

Introduction

The North Dakota Attorney General's office has prepared this manual as a review of existing case law, state statutes, Attorney General opinions, and administrative rules regarding open records and meetings. It includes annotated lists of these authorities, which are intended to be as complete as possible but should not be considered exhaustive. The analysis in this manual summarizes current law and is not an Attorney General opinion.

The issue of how long a public entity should retain particular records is separate from whether a particular record is open, exempt, or confidential under the open records law. However, to provide some assistance in developing a records retention schedule, a list is included in the appendix to this manual indicating the statutes that require certain records be retained for a particular period of time.

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General Open Records Law Requirements

1. What Does the Open Records Law Require?

Similar open records provisions are found in both the North Dakota Constitution and the North Dakota Century Code:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

N.D. Const. art. XI, § 6.¹

1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. . . .
2. Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. A request need not be made in person or in writing, and the copy must be mailed upon request. The entity may charge a reasonable fee for making or mailing the copy, or both. . . . An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour. . . .

N.D.C.C. § 44-04-18.²

The North Dakota Supreme Court summarized the purpose of the open records law shortly after its enactment.

What the Legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and

¹ This section was approved by the citizens of North Dakota in 1978. See 1979 N.D. Sess. Laws ch. 694.

² This section was adopted in 1957 and amended in 1977, 1993, 1997, 1999, 2001, and 2005. See 1957 N.D. Sess. Laws ch. 305; 1977 N.D. Sess. Laws ch. 416; 1993 N.D. Sess. Laws ch. 441, § 1; 1997 N.D. Sess. Laws ch. 381, § 3; 1999 N.D. Sess. Laws ch. 104, § 2; 2001 N.D. Sess. Laws ch. 393; 2005 N.D. Sess. Laws ch. 377. The 1997 amendments explain terminology and add provisions regarding access to electronic records, how certain requests should be made, how the section is violated, and when disclosure properly can be delayed. The 1999 amendment authorize a fee for locating records if locating the records takes longer than one hour. The 2001 amendments clarify the application of the open records law to pending litigation and to copyrighted material. The 2005 amendments authorize a fee for redacting confidential information if doing so takes longer than one hour and establish a per copy fee public entities may charge for copies.

taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters.³

To serve this important public purpose, these open records provisions should be construed liberally in favor of the public's access to information.⁴

2. Who Is Subject to the Open Records Law?

North Dakota's open records law applies to records of a "public entity," which is defined to include three categories of entities:

- a. Public or governmental bodies, boards, bureaus, commissions or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution,⁵ to exercise public authority or perform a governmental function;
- b. Public or governmental bodies, boards, bureaus, commissions or agencies of any political subdivision⁶ of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and
- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.⁷

N.D.C.C. § 44-04-17.1(12). An entity is subject to the open records law if it falls into any one of these three categories.

³ *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543, 546 (N.D. 1960).

⁴ See N.D.C.C. § 1-02-01 (statute construed liberally to further its purpose); N.D.A.G. 2000-O-12 (Oct. 17 to Beulah Public School District); *Hovet v. Hebron Public School Dist.*, 419 N.W.2d 189, 191 (N.D. 1988).

⁵ "Task force or working group" means a group of individuals who have been formally appointed and delegated to meet as a group to assist, advise, or act on behalf of the individual in charge of a state agency or institution when a majority of the members of the group are not employees of the agency or institution." N.D.C.C. § 44-04-17.1(16).

⁶ "Political subdivision" includes any county or city, regardless of the adoption of any home rule charter, and any airport authority, township, school district, park district, rural fire protection district, water resource district, solid waste management authority, rural ambulance service district, irrigation district, hospital district, soil conservation district, recreation service district, railroad authority, or district health unit." N.D.C.C. § 44-04-17.1(10).

⁷ "Public funds" means "cash and other assets with more than minimal value received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(13). See also N.D.A.G. 98-O-24 (Nov. 23 to Garylle Stewart and Vern Bennett); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson).

a. Nongovernmental Organizations

The fact that an organization is a corporation or other business entity rather than a governmental entity does not necessarily mean that the organization is excluded from the definition of "public entity" for purposes of the open records law. Based on the definitions of certain terms used in the open records law, there are three circumstances in which the records of a nongovernmental organization may be open to the public.⁸

First, the organization may be created or recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function.⁹ As used in N.D.C.C. § 44-04-17.1(12)(b), the terms "resolution, ordinance, rule, [or] bylaw" refer to enactments by the official or group responsible for making binding legislative or policy decisions on behalf of the political subdivision.¹⁰ An executive order of the Governor or chief executive authority of a political subdivision also may create or recognize an organization as a "public entity."

Second, an organization may be a "public entity" if the organization is supported by public funds or is expending public funds.¹¹ A nongovernmental organization is expending public funds if it receives and uses a direct appropriation from a governmental entity¹² or if it manages a pool of public funds on behalf of one or more public entities.¹³ An organization is "supported in whole or in part by public funds" if the organization receives public funds that exceed the fair market value of any goods or services given in exchange for the funds.¹⁴ The manner of payment is not important and can include grants, membership dues, or fees. However, an organization receiving public funds under a contract with a public entity is not supported by those funds as long as the funds were paid in exchange for goods or services that are reasonably identified in the agreement and have an equivalent fair market value, which may include a commercially reasonable amount of profit for the contractor.¹⁵ A payment under a vague

⁸ N.D.A.G. 2003-O-10 (Sept. 4 to Tri-County Intervention, Inc.); N.D.A.G. 99-O-03 (Apr. 7 to Murray Sagsveen); N.D.A.G. 99-O-02 (Apr. 5 to Steve Spilde); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson); N.D.A.G. 98-O-21 (Sept. 22 to Wes Tossett and Gary Puppe).

⁹ N.D.C.C. § 44-04-17.1(12)(a), (b).

¹⁰ N.D.A.G. 97-O-02 (Dec. 22 to Melvin Fischer and Lowell Jensen). One example would be a resolution of a governing body of a political subdivision authorizing a joint enterprise between the political subdivision and the corporation. N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson).

¹¹ N.D.C.C. § 44-04-17.1(9).

¹² N.D.A.G. 2003-O-08 (July 22 to the Dakota Center for Independent Living); N.D.A.G. 96-F-18 (Sept. 13 to Gerald Sveen).

¹³ N.D.A.G. 99-O-5 (Apr. 5 to Steve Spilde).

¹⁴ N.D.C.C. § 44-04-17.1(9).

¹⁵ N.D.A.G. 2003-O-01 (Jan. 30 to Minot Public School Board) (guaranteed energy savings contracts pursuant to N.D.C.C. § 48-05-09 through 48-05-13 are presumed to be entered into for fair market value); N.D.A.G. 99-O-15 (Apr. 7 to Murray Sagsveen); N.D.A.G. 98-F-19 (June 10 to Carol Olson).

and indistinct contract for unspecified goods or services is considered "support."¹⁶ The key question is whether public funds are being used to support an organization, or merely to purchase goods or services.¹⁷

If an organization receives public funds under an authorized economic development program, the exchange is conclusively presumed to be for fair market value rather than "support" and the organization is therefore not a public entity as a result of receiving the funds.¹⁸ However, this presumption is limited to grants to new employers or businesses for their general operations.¹⁹

Third, even if an organization is paid fair market value for the services it provides, the organization may be considered an agent or agency of a public entity if the organization performs a governmental function or possesses records regarding public business on behalf of a public entity.²⁰ Examples of "agencies of government" include personnel firms, an advertising company hired to perform an educational campaign on behalf of a city,²¹ a local economic development corporation,²² and a college bookstore.²³

Public entities cannot avoid the requirements of the open records law by forming joint enterprises and transferring funds to that enterprise.²⁴ Thus, a joint enterprise of several public entities to carry out the public business of those entities is an "agency" of those entities and is therefore a "public entity," even if the enterprise is formed as a separate corporation.²⁵

Nine non-exclusive factors may be used to help determine whether a contractor is simply providing services to a public entity or is acting in place of or on behalf of the entity: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an

¹⁶ N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo); N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

¹⁷ N.D.A.G. 2003-O-02 (Feb. 21 to James River Senior Citizen's Center) (a nongovernmental organization that receives mill levy money for its general support without a specific contract with the county for specific services to be provided in exchange for the mill levy money and had discretion in using mill levy money was a public entity).

¹⁸ N.D.C.C. § 44-04-17.1(9); N.D.A.G. 98-O-23 (Nov. 9 to Howard Swanson) (Community Development Block Grant funds).

¹⁹ N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

²⁰ N.D.C.C. § 44-04-17.1(12), (15). See also *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986).

²¹ N.D.A.G. 2001-O-04 (May 16 to Laurel Forsberg).

²² N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo); N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek).

²³ N.D.A.G. 2004-L-25 (April 1 to Ray Holmberg).

²⁴ N.D.A.G. 99-O-02 (Apr. 5 to Steve Spilde).

²⁵ *Id.* (North Dakota Insurance Reserve Fund); See also N.D.A.G. 98-O-21 (Sept. 22 to Wes Tossett and Gary Puppe) (Association of Soil Conservation Districts is an agency of its members); N.D.A.G. 98-O-04 (Mar. 3 to Norbert Sickler and Franklin Appledorn) (Southwest Multi-County Correction Center is a joint enterprise of several counties to operate as an agency of those counties).

integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.²⁶

3. Court Records

State courts are not subject to the open records law.²⁷ However, the Supreme Court has also concluded that "it is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court."²⁸ This right is not unlimited, but can be subject to reasonable rules and regulations of the court. Management of court records is an inherent power of the court.²⁹ District court clerks maintain and dispose of court records according to rules, policies and procedures adopted by the Supreme Court.³⁰ The Disciplinary Board and the Judicial Conduct Commission of the North Dakota Supreme Court are adjuncts of the Supreme Court and are not subject to the open records laws.³¹ Their records are instead governed by rules of the Supreme Court.³²

Some court decisions and statutes indicate whether certain court records are open to the public. For example, the court docket is open to the public.³³ Criminal records are also open once judicial proceedings are completed.³⁴ Records pertaining to an action to determine parentage are generally confidential except for the final judgment.³⁵ Juvenile court records are also confidential as a general rule, but are open to the public if the records pertain to a petition which has been considered in an open hearing because the petition alleges conduct for which the juvenile may be transferred to district court for criminal prosecution.³⁶ In addition, "juvenile court" is limited to North Dakota district courts and does not include courts in other jurisdictions.³⁷ Also, "[f]ollowing an adjudication of delinquency for an offense that would be a felony if committed by an adult, the juvenile's school principal, chief administrative officer, or designated school

²⁶ N.D.A.G. 2004-L-25 (April 1 to Ray Holmberg); N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo).

²⁷ N.D.C.C. § 44-04-17.1(15); N.D.A.G. 2002-L-19 (Apr. 1 to Kenneth Dalstad). Accord Grand Forks Herald v. Lyons, 101 N.W.2d 543 (N.D. 1960).

²⁸ State v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967).

²⁹ N.D.A.G. 94-F-18 (July 1 to Jeff Rotering).

³⁰ N.D.C.C. § 27-05.2-06.

³¹ N.D.A.G. 2003-O-06 (April 25 to Disciplinary Board of the Supreme Court).

³² Id.

³³ Minot Daily News v. Holum, 380 N.W.2d 347 (N.D. 1986).

³⁴ State v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967); see also N.D.A.G. 75-27 (Nov. 18 to Myron Atkinson).

³⁵ N.D.C.C. § 14-17-19.

³⁶ N.D.C.C. § 27-20-51.

³⁷ N.D.A.G. 2000-F-09 (Feb. 28 to Frank Wald).

guidance counselor, if requested, must be allowed access to the disposition order."³⁸ Other juvenile court records may be shared with the superintendent or principal of the school the child is attending or plans to attend if the child appears to pose a threat to self or to the students or staff of the school.³⁹

4. What Material is Covered by the Open Records Law?

As used in the open records law:

"Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.⁴⁰

"Record" does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers.

"Record" also does not include records in the possession of a court of this state.⁴¹

N.D.C.C. § 44-04-17.1(15).

The term "record" does not include "every scrap of written material possessed by a public official."⁴² To be subject to the open records law, a record must have a link or association with public business.⁴³ Public business means "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [t]he public entity's use of public funds."⁴⁴ Thus, records of a nongovernmental organization that is a "public entity" because it is supported by or expending public funds but is not otherwise performing a governmental function are open only to the extent the records pertain to how public funds are being or have been spent. When public funds are provided to an organization for its general support, rather than for a particular project, all financial records of the

³⁸ N.D.C.C. § 27-20-51(4).

³⁹ Id.

⁴⁰ This definition is not limited to records required to be kept by law. Accord City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 577-78 (N.D. 1981); N.D.A.G. 2003-O-04 (Feb. 25 to City of Fargo)(E-mails stored on a computer's electronic backup system are records in the possession of a public entity); N.D.A.G. 94-F-19 (July 1 to Jerome Kelsch); N.D.A.G. 57-148 (June 4, 1958)(Records include day-to-day correspondence of public officials on matters relating to their official duties).

⁴¹ Accord Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960). However, court records will generally be open to the public under other statutes and court rules.

⁴² N.D.A.G. 62-118 (Jan. 12, 1962).

⁴³ N.D.C.C. § 44-04-17.1(15); N.D.A.G. 98-L-128 (Sept. 2 to Jeff Rotering).

⁴⁴ N.D.C.C. § 44-04-17.1(11).

organization, including its budget, must be open to the public to determine how the public funds were used.⁴⁵

The open records law is not limited to records possessed by a public entity itself. It also applies when a public entity delegates a public duty to a third party.⁴⁶ A request for records in the possession of an agent of a public entity may not be denied because the agent does not "own" the records. Rather, records regarding public business that are created or possessed by an agent of a public entity, or created by a third party contractor and possessed by a public entity, should be treated the same as if they were created and possessed by the public entity itself and are subject to the open records law.⁴⁷

5. Who Has the Right to Inspect Open Records?

Every person has a right to inspect any open public record. Interested persons, news media representatives, governmental agencies, and all others stand on an equal footing under the open records law.⁴⁸ Advance notice of a request to inspect open records is not required. Rather, "anyone who walks into city offices without advance notice is entitled to inspect city records."⁴⁹ There is no requirement that a requestor must live within the jurisdiction of the public entity, be a North Dakota resident, or a United State's citizen.⁵⁰ The motive and identity of the person requesting an open record are usually **irrelevant**; the right to access to public records belongs to all persons equally.⁵¹

a. Requests from an Adversary to a Pending Action or Proceeding

The general rule that open records are available to anyone upon request does not apply if the person requesting the records is a party to a criminal or civil action or adversarial administrative proceeding in which the public entity is also a party, or if the person is acting on behalf of a party. In those cases, the request must be made to the attorney representing the public entity in the action or proceeding and is governed by applicable discovery rules.⁵² Any documents that would normally be open to the public but would

⁴⁵ N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo); N.D.A.G. 2001-O-10 (Sept. 7 to Robert Lamont and Nevin Van de Streek); N.D.A.G. 98-O-24 (Nov. 23 to Garryle Stewart and Vern Bennett).

⁴⁶ N.D.C.C. § 44-04-17.1(15) (records in possession or custody of public entity or agent). Accord Forum Publishing Company v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986).

⁴⁷ N.D.A.G. 98-L-73 (June 8 to Jim Heck); N.D.A.G. 2004-L-25 (April 1 to Ray Holmberg).

⁴⁸ N.D.A.G. 2005-O-12 (June 28 to Oakes Park Board); N.D.A.G. 94-F-18 (July 1 to Jeff Rotering); Letter from Chief Deputy Attorney General Gerald VandeWalle to Russell Staiger (Feb. 23, 1978). See also N.D.A.G. 81-130 (Dec. 7 to Jan Dykshoorn) (open records law provides no discretion to public body over persons allowed to inspect open record).

⁴⁹ Letter from Attorney General Nicholas Spaeth to Steven Tomac (July 17, 1991).

⁵⁰ N.D.A.G. 2005-O-12 (June 28 to Oakes Park Board).

⁵¹ N.D.A.G. 2005-O-12 (June 28 to Oakes Park Board); N.D.A.G. 98-F-13 (May 12 to Johanna Zschomler).

⁵² N.D.C.C. § 44-04-18(6).

be privileged under discovery rules may be withheld from an adversary or agent of an adversary.⁵³ In addition, the public entity may require the person requesting the documents to use the discovery process rather than the open records law to compel the production of its records.⁵⁴

6. When Must Open Records be Available?

North Dakota's open records law requires public records to be "open and accessible for inspection during reasonable office hours." "Reasonable office hours" includes all regular office hours of a public entity.⁵⁵ Because the term "reasonable" modifies "office hours" rather than "open and accessible," those hours must be reasonable.⁵⁶ Reasonable is a flexible standard and depends on the facts of each office.⁵⁷

If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities [and] for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities.

N.D.C.C. § 44-04-18(1).

A public entity is not required to provide access to open records outside its regular office hours.⁵⁸ However, if authorized by the public body, public servants can provide access to public records after normal office hours, as long as the public servant does not personally accept compensation for providing that access.⁵⁹

7. How Do I Respond to a Request for Records?

a. Requests for Open Records

All records must be open and accessible for inspection by the public unless otherwise specifically provided by law.⁶⁰ In addition to access, a person is entitled to obtain one

⁵³ N.D.A.G. 2002-O-05 (Apr. 1 to Fred Strege).

⁵⁴ Id.

⁵⁵ N.D.C.C. § 44-04-18(1).

⁵⁶ Letter from Attorney General Nicholas Spaeth to Steven Tomac (July 17, 1991); N.D.A.G. 97-106 (Aug. 8 to William Gorder).

⁵⁷ Letter from Chief Deputy Attorney General Gerald VandeWalle to James Odegard (Oct. 5, 1977) (normal office hours of 9 a.m. to 5 p.m. from Monday to Friday would be reasonable).

⁵⁸ N.D.A.G. 97-O-1 (Nov. 10 to Bob Harvey and Patricia Burke).

⁵⁹ N.D.A.G. 82-02 (Jan. 20 to Herbert Engberg).

⁶⁰ N.D.C.C. § 44-04-18(1).

copy of an open record and to have the copy mailed to the requester.⁶¹ As used in the open records law, “copy” means a duplicate or exact reproduction of the original record.⁶² Once a request for records is made to a public entity, the public entity must respond within a reasonable time by providing the requested records or explaining why the request is not being satisfied.⁶³ A public entity is not required to provide more than one copy of a record to the same requester, but the entity should make sure that the requested copy has previously been provided to the requester, and the public entity must explain that the request for records is being denied because the records have previously been provided to the requester.⁶⁴

A request for records need not be made in person or in writing unless a statute requires otherwise.⁶⁵ In addition, the North Dakota Supreme Court has held that a public entity is not required to comply with a continuing request for records and can require separate, periodic requests.⁶⁶ Although the open records law does not require officers or employees of a public entity to comment on the substance of an open record, an officer or employee may do so and agreements prohibiting such verbal disclosure are against public policy and are void.⁶⁷

A request for public records “may not be denied because it involves a substantial number of copies or because the same individual makes multiple requests.”⁶⁸ As long as the request reasonably identifies the records being requested, the number of records being requested affects the time within which a public entity must respond but does not affect the validity of the request.⁶⁹ A request also may not be denied if a document or file contains both open and closed or confidential information.⁷⁰ Instead, the public entity must remove the closed or confidential information and disclose the rest of the record.⁷¹ Except for certain computer records, however, nothing requires a public entity to create a new record, disclose records which do not exist, or disclose records it does not have

⁶¹ N.D.C.C. § 44-04-18(2).

⁶² N.D.A.G. 2005-O-05 (March 30 to NDSU) (The document printed from the computer is the copy for which a person may be charged); N.D.A.G. 2001-O-06 (June 18 to Norbert Sickler) (black and white photocopy of color photographs was not a “copy”).

⁶³ N.D.C.C. § 44-04-18(7)(8); N.D.A.G. 2004-O-05 (Sept. 17 to Grand Forks County Planning and Zoning Department); N.D.A.G. 2004-O-11 (May 17 to Halliday Public School Dist. No. 19).

⁶⁴ N.D.A.G. 98-O-20 (Sept. 15 to Mike Every and Karen Mitzel).

⁶⁵ N.D.C.C. § 44-04-18(2).

⁶⁶ Robot Aided Mfg., Inc. v. North Dakota Dep’t of Transp., 589 N.W.2d 187 (1999).

⁶⁷ N.D.C.C. § 44-04-18.10(3).

⁶⁸ Letter from Attorney General Nicholas Spaeth to Howard Swanson (Aug. 13, 1991).

⁶⁹ N.D.A.G. 2001-O-12 (Sept. 26 to Randall Sickler).

⁷⁰ N.D.C.C. § 44-04-18.10(1). N.D.A.G. 2003-O-01 (Jan. 30 to Minot Public School Board) (guaranteed energy savings contracts pursuant to N.D.C.C. § 48-05-09 through 48-05-13 are presumed to be entered into for fair market value).

⁷¹ N.D.C.C. § 44-04-18.10(2). If confidential or closed information in an e-mail cannot be separated in the electronic record, the public entity must provide a printed copy of the e-mail with the confidential information removed. N.D.A.G. 2003-O-04 (Feb. 25 to City of Fargo).

in its possession or custody.⁷² A public entity also is not required to create a new record by compiling information from other records.⁷³

A public entity may require the presence of one of its employees or officials as a security measure when providing access to its records, but that requirement may not be used to deny access merely because it is inconvenient.⁷⁴

The open records law is violated when a person's right to review or receive a copy of an open record is denied or unreasonably delayed, or when an excessive fee is charged for copies of records.⁷⁵ A denial of an open records request must indicate the entity's specific authority for denying access to the requested record and be made in writing, if requested.⁷⁶ This requirement applies even if the request is denied on the basis that the requested records do not exist.⁷⁷ An explanation that a denial is based on the advice of the public entity's attorney is not sufficient.⁷⁸ A denial must address all the requested records which are not provided.⁷⁹

b. Response within a Reasonable Time

Although state law includes a growing number of exemptions from the open records law, public officials and employees generally should know what records under their control must be disclosed. Therefore, access to an open record usually must be granted within a fairly short period of time after a request has been made. Immediate access or copies are not always required, but the amount of time within which the public entity must respond to the request will usually be measured in hours or a few days rather than several days or weeks.⁸⁰ When there is a doubt whether a record must be disclosed, a public official or employee may take a reasonable amount of time to determine whether an exemption from the open records law applies to the record in question and may consult with the attorney for that official or employee if needed.⁸¹ However, a delay to seek legal advice is reasonable only if there is a legitimate legal and factual question on what information must be disclosed, and is limited to the length of time which is

⁷² N.D.C.C. § 44-04-18(4); N.D.A.G. 2005-O-13 (Aug. 10 to the Grand Forks Police Department) (Each agency of a political subdivision is only responsible for records in its possession and not for records in the possession of another agency of the same political subdivision); N.D.A.G. 2004-O-05) (Feb. 17 to the Grand Forks Zoning and Planning Department).

⁷³ N.D.A.G. 98-O-20 (Sept. 15 to Mike Every and Karen Mitzel).

⁷⁴ Letter from Attorney General Nicholas Spaeth to Steven Tomac (July 17, 1991)

⁷⁵ N.D.C.C. § 44-04-18(7).

⁷⁶ N.D.C.C. § 44-04-18(6).

⁷⁷ N.D.A.G. 98-O-10 (May 7 to R. James Maxson et al).

⁷⁸ N.D.A.G. 2000-O-13 (Dec. 14 to Norbert Sickler).

⁷⁹ N.D.A.G. 98-O-03 (Feb. 20 to Glenn Giese and Lester Brackel).

⁸⁰ N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies).

⁸¹ N.D.A.G. 82-23 (Mar. 25 to Kent Conrad).

reasonably necessary to obtain that advice.⁸² Further delay in responding to a request until the next regular meeting of the governing body is not reasonable.⁸³

Other factors to consider in determining the appropriate length of time within which to respond to a request include the need to remove confidential or closed material, the quantity of records requested, and whether the public entity employs staff on a part-time or full-time basis.⁸⁴ If a public entity cannot reasonably respond to a request immediately, it is not required to identify a specific date when the records will be available,⁸⁵ but the burden is on the public entity to let the requester know when the records are available, which must occur within a reasonable time.⁸⁶

c. Electronic Records

In the area of electronic records, it may be more difficult to separate closed or confidential information from information subject to public disclosure. Therefore, a specific provision describes the proper method of providing public access to electronic records.

Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization. This section does not require a public entity to provide a requester with access to a computer terminal.

N.D.C.C. § 44-04-18(4).⁸⁷

Access from a remote location is also authorized for records of state-level entities if procedures are adopted to maintain the confidentiality of information protected by federal or state law.⁸⁸

⁸² N.D.A.G. 2001-O-02 (Apr. 5 to Gary Thune). See also N.D.A.G. 2001-O-04 (May 16 to Laurel Forsberg) (delay of seven days for legal advice was not necessary to indicate that the requested records did not exist).

⁸³ Id.

⁸⁴ N.D.A.G. 98-O-03 (Feb. 20 to Glenn Giese and Lester Brackel).

⁸⁵ N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies).

⁸⁶ N.D.A.G. 98-O-20 (Sept. 15 to Mike Every and Karen Mitzel); N.D.A.G. 98-O-04 (Mar. 3 to Norbert Sickler and Franklin Appledorn).

⁸⁷ See also N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies) (it may be necessary to create a new record to segregate closed or confidential information in the same electronic record).

⁸⁸ N.D.C.C. § 44-04-18(5).

d. Preliminary Drafts and Working Papers

Preliminary drafts and working papers are expressly included in the statutory definition of "record."⁸⁹ However, state law authorizes a public entity to temporarily delay public disclosure of these records under certain circumstances.⁹⁰ The phrases "working paper" and "preliminary draft" are interchangeable and refer to records which are created and used in the process of creating another record.⁹¹ There are two parts to the delay provision for preliminary drafts and working papers: a "right of first review" provision and a "work in progress" provision.⁹² A record prepared at the express direction of, and for presentation to, a governing body may be withheld from the public "until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first."⁹³ Similarly, a working paper or preliminary draft may be withheld "until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first."

For public entities headed by a single individual, a working paper or preliminary draft may be withheld from the public "until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first."⁹⁴

8. What can be Charged for Open Records?

a. Fees for Locating and Providing Access to Records

Until 1999, a public entity could not charge a fee for locating and providing access to public records unless those fees were authorized by statute. As amended in 1999, N.D.C.C. § 44-04-18(2) currently provides in part: "[a]n entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour." This provision authorizes a public entity to charge a fee for locating the records that a person has requested if the search takes longer than one hour,⁹⁵ but does not authorize an access fee once the records have been located. A public entity may not charge a fee for the time to prepare a new record that had not been requested.⁹⁶ An access fee is authorized when a

⁸⁹ N.D.C.C. § 44-04-17.1(15).

⁹⁰ N.D.C.C. § 44-04-18(9) & (10).

⁹¹ N.D.A.G. 98-O-04 (Mar. 3 to Norbert Sickler and Franklin Appledorn).

⁹² N.D.A.G. 2001-O-04 (May 16 to Laurel Forsberg).

⁹³ N.D.C.C. § 44-04-18(9). This provision does not apply to source documents that are collected on behalf of a governing body rather than prepared at the direction of the governing body. N.D.A.G. 2001-O-02 (Apr. 5 to Gary Thune).

⁹⁴ N.D.C.C. § 44-04-18(10),

⁹⁵ A public entity may charge \$25 per hour, after the first hour for retrieving e-mails of certain city officials from e-mails of all other city employees with which they are intermingled. N.D.A.G. 2003-O-04 (Feb. 25 to City of Fargo).

⁹⁶ N.D.A.G. 2000-O-11 (Sep. 1 to Linda Cooksey).

state-level public entity provides outside access to electronic records, except for access to another state-level public entity.⁹⁷

b. Fees for Reviewing and Excising Closed or Confidential Information

Prior to 2005, a public entity could not charge a fee for the time it took the public entity to review the records and excise closed or confidential material from the records. As amended in 2005, N.D.C.C. § 44-04-18(2) provides in part: “[a]n entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for excising confidential or closed material under 44-04-18.10.”⁹⁸

c. Fees for Copying Records

Public entities may recover the costs incurred in providing copies of public records. Section 44-04-18(2), N.D.C.C. provides:

A public entity may charge up to twenty-five cents per impression of a paper copy. As used in this section, “paper copy” means a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches. For any copy of a record that is not a paper copy as defined in this section, the public entity may charge a reasonable fee for making the copy. As used in this section, “reasonable fee” means the actual cost to the public entity of making the copy, including labor, materials, and equipment. The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before making or mailing the copy, or both. . . This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

N.D.C.C. § 44-04-18(2). Under this section, a public entity may charge its actual costs for making a copy of a record that cannot be copied on paper of a size not more than eight and one-half by fourteen inches, such as large maps, color photographs or computer discs. A public entity may charge its actual costs for copying or mailing a copy, or both, after the records have been located. In determining the public entity’s actual cost of making copies, it is helpful to separate the fixed costs associated with each copy (materials and equipment) from the labor cost that will vary with each request.

As the last sentence in N.D.C.C. § 44-04-18(2) indicates, a public entity may charge a different fee for records if specifically authorized by another statute.⁹⁹ A specific fee for

⁹⁷ N.D.C.C. § 44-04-18(4).

⁹⁸ N.D.C.C. § 44-04-18(2).

⁹⁹ N.D.A.G. 2000-L-94 (May 26 to James Johnson).

a copy of a compilation if set by statute, may exceed the entity's actual cost of making the copy. Fees for copies of the source documents used to prepare that compilation, however, are subject to the copy fee allowed in N.D.C.C. § 44-04-18(2).¹⁰⁰

9. Open Records and Copyright

Federal copyright protection comes into existence immediately upon the creation of an original work, even if the copyright has not been registered.¹⁰¹ While copyright protection is not available for original works of the United States Government,¹⁰² state and local government entities are not similarly precluded from claiming copyright protection in their original works.¹⁰³ Any use of a copyrighted record without the permission of the public entity, except for “fair use” as defined in the Copyright Act, is prohibited.¹⁰⁴ “A disclosure of a requested record under [the open records law] is not a waiver of any copyright held by the public entity in the requested record”¹⁰⁵

10. How Is the Open Records Law Enforced?

a. Administrative Review

Any interested person may request an Attorney General’s opinion to review an alleged violation of the open records law by any public entity other than the Legislative Assembly or any committee thereof.¹⁰⁶

A request made under this section must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the notice required by section 44-04-20, must be made within ninety days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a [nongovernmental organization], the opinion must be issued

¹⁰⁰ Robot Aided Mfg., Inc. v. North Dakota Dep’t of Transp., 589 N.W.2d 187, 191 (N.D. 1999).

¹⁰¹ 17 U.S.C. § 102.

¹⁰² 17 U.S.C. § 105.

¹⁰³ See, e.g., County of Suffolk, New York v. First American Real Estate Solutions, 261 F.3d 179 (2nd Cir. 2001).

¹⁰⁴ 17 U.S.C. § 107.

¹⁰⁵ N.D.C.C. § 44-04-18(11).

¹⁰⁶ N.D.C.C. § 44-04-21.1(1).

to the public entity providing the public funds. In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity.

N.D.C.C. § 44-04-21.1(1).

If the Attorney General's opinion concludes that a violation has occurred, the public entity has seven days to comply with the opinion and take corrective action, regardless of whether a civil action is filed under section 44-04-21.2. If the public entity fails to do so, and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded attorneys' fees and costs for the trial and any appeal. "The consequences for failing to comply with an attorney general's opinion issued under this section will be the same as for other attorney general's opinions, including potential personal liability for the person or persons responsible for the noncompliance."¹⁰⁷ A state-level public entity that does not comply in full with the Attorney General's opinion is responsible for obtaining separate legal counsel, at its own expense, and the attorney must obtain an appointment as a special assistant attorney general under N.D.C.C. § 54-12-08.¹⁰⁸

b. Civil Action

In 1997, the Legislative Assembly authorized a civil action by any interested person against a public entity for violations of the open records law.¹⁰⁹ A complaint alleging a violation of the open records law must be accompanied by a dated, written request for the requested record. The action must be commenced within 60 days of the date the person knew or should have known of the violation or within 30 days of issuance of an Attorney General's opinion on the alleged violation, whichever is later. The action must be commenced in the county where the entity has its principal office or in Burleigh County for entities that do not have a principal office within the state.

"If a court finds that any of these sections have been violated by a public entity, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity."¹¹⁰ Damages may be assessed in the amount of \$1,000 or actual damages, whichever is greater, for an intentional or knowing violation of these laws. The court can also void any action that is a product of an illegal meeting.¹¹¹

¹⁰⁷ N.D.C.C. § 44-04-21.1(2).

¹⁰⁸ N.D.C.C. § 44-04-21.1(3).

¹⁰⁹ N.D.C.C. § 44-04-21.2(1).

¹¹⁰ N.D.C.C. § 44-04-21.2(1).

¹¹¹ N.D.C.C. § 44-04-21.2(2).

This section does not authorize a civil action if the violation has been cured before the action is filed and no person has been harmed by the delay.¹¹² Furthermore, a public entity may not be sued for attorneys' fees or damages, or both, until at least three working days after the chief administrative officer for the public entity receives notice and opportunity to cure the alleged violation. This opportunity to cure a violation does not apply if the public entity has previously been found by the Attorney General to have violated the open records or meetings laws.

c. Criminal Violations

Under legislation enacted in 2001, a public servant who knowingly violates the open records and meetings laws is guilty of a class A misdemeanor.¹¹³

11. Examples of Records Generally Open to the Public

a. Minutes of Open Meetings

Public entities must take minutes of all meetings. Minutes are public records and are open to the public, even if not yet formally approved.¹¹⁴ Except that minutes of the confidential or closed portion of a meeting are not required to be open.¹¹⁵

b. Personnel Records

Personnel records, including information regarding the salary and job performance of an employee, are generally open to the public. However, there is an exception to this general rule for "personal information" regarding a current or past public employee, or applicant for employment with a public entity, if the information is contained in the employee's personnel file or otherwise given to the state or a political subdivision in the course of employment.

"[P]ersonal information" means a person's home address; home telephone number; photograph; medical information; motor vehicle operator's identification number; payroll deduction information; the name, address, phone number, and date of birth, of any dependent or emergency contact; any credit, debit, or electronic fund transfer card number; and any account number at a bank or other financial institution.

N.D.C.C. § 44-04-18.1(2).¹¹⁶

¹¹² N.D.C.C. § 44-04-21.2(3).

¹¹³ N.D.C.C. §§ 44-04-21.3, 12.1-11-06.

¹¹⁴ N.D.C.C. § 44-04-21(2).

¹¹⁵ N.D.A.G. 98-O-25 (Nov. 24 to Douglas Schauer); N.D.A.G. 67-193 (Apr. 11, 1967, to M.F. Peterson).

¹¹⁶ Compare Hovet v. Hebron School Dist., 419 N.W.2d 189 (N.D. 1988) (teacher's personnel file); Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986) (job applications); City of Grand Forks v. Grand

Information other than that listed above, included on a job application or resume submitted by an applicant for employment with a public entity would be open to the public.¹¹⁷

c. Financial Records and Contracts of a Public Entity

Financial records of a public entity, including its checkbook, are generally open to the public.¹¹⁸ Contracts and settlements of lawsuits or claims against the entity would be open also.¹¹⁹

d. Corporate Information

Nonfinancial corporate information contained in the annual reports filed with the Secretary of State is not confidential and is open to the public.¹²⁰ This information would include the name and address of a corporation, its registered agent, officers and board of directors, and a brief statement of the corporation's business.

Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981) (personnel file of former chief of police); Letter from Attorney General Nicholas Spaeth to R.L. Rayl (Apr. 21, 1988).

¹¹⁷ See N.D.A.G. 98-F-11 (Apr. 30 to Mark Blumer).

¹¹⁸ N.D.A.G. 94-L-103 (Apr. 14 to Wayne Hokenson).

¹¹⁹ N.D.A.G. 94-L-90 (Apr. 4 to Jim Yockim).

¹²⁰ See N.D.C.C. § 10-19.1-146.

Exemptions from the Open Records Law

Records possessed by an entity subject to the open records law are presumptively open to the public during normal business hours. However, because the open records law does not apply if "otherwise specifically provided by law," public records need not be disclosed if they fall within a specific exemption from the open records law.¹²¹

[B]ecause the open-records law provides that governmental records are to be open to the public "Except as otherwise specifically provided by law," an exception to the open-records law may not be implied. In order that a record may be excepted from the open-records law the Legislature must specifically address the status of that type of record--e.g., statements that a certain type of record is confidential or that it is not open to the public.¹²²

As a result, in contrast to the broad interpretation of the open records law, an exemption from the open records law must be firmly grounded in law rather than an implied, vague, or arguable exemption.

1. Sources of Exemptions

Exemptions from the open records law must be "specifically provided by law." "Law" includes "federal statutes, applicable federal regulations, and state statutes."¹²³ The term "law" does not include contracts entered into by public entities; rather, it is the exclusive province of the Legislature to enact exceptions to the open records law.¹²⁴ A public entity may not close or make confidential a record through administrative rules. State law, however, delegates to some administrative agencies the authority to, by administrative rule, make certain confidential records available to the public.¹²⁵ Upon becoming effective, administrative rules adopted pursuant to N.D.C.C. ch. 28-32 "have the force and effect of law."¹²⁶

As a general rule, when two public entities possess the same record, each entity possesses the record in its own capacity and must make its own decision on whether to disclose the record.¹²⁷ Most exceptions to the open records law are specific to the entity possessing the records, and do not apply to records which are also possessed by

¹²¹ Records not subject to the open records law are still public records. N.D.A.G. 94-L-52 (Mar. 7 to Ronald McBeth); N.D.A.G. 65-75 (Jan. 15, 1965, to John Alphson).

¹²² Hovet v. Hebron Public School District, 419 N.W.2d 189, 191 (N.D. 1988) ("specific" and "implied" have opposite meanings), cited with approval in Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995).

¹²³ N.D.C.C. § 44-04-17.1(7). See also Dickinson Newspapers Inc. v. Jorgensen, 338 N.W.2d 72, 75 (N.D. 1983) (court rules).

¹²⁴ N.D.A.G. 2000-F-09 (Feb. 28 to Frank Wald).

¹²⁵ See N.D.C.C. §§ 23-07-20.1, 50-06-15.

¹²⁶ N.D.C.C. § 28-32-06.

¹²⁷ N.D.A.G. 98-L-73 (June 8 to Jim Heck); N.D.A.G. 94-L-1 (Jan. 3 to Charles Isakson).

another public entity.¹²⁸ In 2005, however, an exception to the general rule was created to provide limited protection for secondary disclosure of confidential records. A new section to N.D.C.C. § 44-04-18.10 provides that “[c]onfidential records that are authorized by law to be disclosed to another entity continue to be confidential in the possession of the receiving entity, except as otherwise provided by law.”¹²⁹

The application of a statute making certain records confidential or exempt may be waived by the party or parties for whose benefit the statute was passed.¹³⁰

a. Effective Date of New Exemptions

A public entity’s response to an open records request is not governed by the law in effect when the requested records were created, but rather by the law in effect on the date the entity is required to respond to the request.¹³¹

2. Types of Exemptions

There are three classes of public records under North Dakota law.¹³² The first class consists of documents that are confidential. Disclosure of these documents is generally prohibited. The second class consists of documents that are subject to the open records law. Disclosure of these documents is generally required. A public entity generally has no discretion regarding disclosing records in either of these two classes. There is a third class of documents consisting of documents that are not confidential, but are also not subject to the open records law. Because disclosure of this class of documents is neither prohibited as confidential, nor required to be open, disclosure of these exempt documents by a public entity is discretionary. Whether disclosure is prohibited or merely not required will depend on the specific wording of the law excluding those records from the application of the open records law.

a. Confidential Records

The phrase "confidential records" means "all or part of a record . . . that is either expressly declared confidential or is prohibited from being open to the public."¹³³ Confidential records are characterized by a lack of discretion to disclose documents to the public, and the release of confidential records generally can be punished. The disclosure of confidential information is prohibited by N.D.C.C. § 12.1-13-01, which provides in part:

¹²⁸ N.D.A.G. 2000-F-09 (Feb. 28 to Frank Wald).

¹²⁹ N.D.C.C. § 44-04-18.10(5).

¹³⁰ N.D.A.G. 99-L-30 (Apr. 5 to Wade Enget).

¹³¹ N.D.A.G. 2001-O-12 (Sept. 26 to Randall Sickler).

¹³² See N.D.A.G. 94-L-194 (Aug. 1 to Shirley Dykshoorn).

¹³³ N.D.C.C. § 44-04-17.1(3).

A person is guilty of a class C felony if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant.

Statutes declaring records to be confidential will often indicate that any release of the records is subject to the penalty in this section. However, this penalty would apply without such a reference unless otherwise provided by another statute.

Records need not be expressly declared confidential for their disclosure to be prohibited by N.D.C.C. § 12.1-13-01, which also provides:

"Confidential information" means information made available to the government under a governmental assurance of confidence as provided by statute.

This definition "includes not only those documents which a statute specifically states are confidential, but also those which a statute provides cannot be disclosed or for which the Legislature has provided a penalty for disclosure."¹³⁴

b. Exempt Records

Questions regarding the open records law are generally discussed in terms of the public's right of access to information. Rarely discussed is an agency's discretion to voluntarily disclose to the public records that are not confidential but are exempt from the open records law. In this context, the phrase "exempt record" means "all or part of a record . . . that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity."¹³⁵ There are few opinions of this office describing this discretion, but it should be "based upon the particular situation, the type of record, the interests served by release or nondisclosure of the document and any other relevant factors."¹³⁶

Disclosure of a document or information to one individual or one category of persons does not necessarily mean . . . that the document has become an open record which must be disclosed to all persons. For example, a determination could be made to disclose records only to those persons who were directly affected by them, or those individuals who were named within the records without opening the records to the general public. The administrator's best discretion should be used in each instance to determine whether a request for a record will be granted.¹³⁷

¹³⁴ N.D.A.G. 94-L-194 (Aug. 1 to Shirley Dykshoorn).

¹³⁵ N.D.C.C. § 44-04-17.1(5).

¹³⁶ N.D.A.G. 94-L-194 (Aug. 1 to Shirley Dykshoorn).

¹³⁷ Id.

If the public entity has not exercised its discretion to disclose all or part of an exempt record, the record is a "closed record."¹³⁸

3. Limits on Exemptions

In addition to the requirement that exemptions be specifically provided by law, there may be several other limits on exemptions from the open records law.

a. Temporary Exemptions

Some public records are exempt from the open records law for only a limited time. For example, criminal intelligence and investigative information is exempt only so long as the information is related to "active" intelligence gathering or investigations.¹³⁹ Similarly, the investigative records of fire departments and fire protection districts are confidential until the investigation is closed or no longer active.¹⁴⁰

There are public entities that must monitor and enforce compliance with the law or an order. The investigatory work product obtained, compiled, or prepared by a public entity gathered while doing so is exempt as long as the records are related to monitoring or enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of the law or an order.¹⁴¹

Attorney work product is open to the public once litigation or adversarial administrative proceedings are completed, including the exhaustion of all appellate remedies, as long as no other exception applies; disclosure would not have an adverse fiscal effect on other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings; or the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.¹⁴² Finally, bids or proposals received by a public entity in response to a request for proposals by the public entity are exempt until such time all the proposals have been received and opened by the public entity or until such time that all oral presentations regarding the proposals, if any, have been heard by the public entity.¹⁴³

b. Open to Certain People or Entities

The open records law and its exemptions are not meant to interfere with government operations. Thus, even where records are declared confidential, they may be open to certain entities or people as provided by law. For example, confidential law enforcement

¹³⁸ N.D.C.C. § 44-04-17.1(2).

¹³⁹ N.D.C.C. § 44-04-18.7.

¹⁴⁰ N.D.C.C. § 44-04-30.

¹⁴¹ N.D.C.C. § 44-04-19.1(3) & (6).

¹⁴² N.D.C.C. § 44-04-19.1(8).

¹⁴³ N.D.C.C. § 44-04-18.4(6).

records "of a child alleged or found to be delinquent, unruly, or deprived" may nevertheless be open to a juvenile court having the child before it in any proceeding and to the attorney for a party to that proceeding.¹⁴⁴ Likewise, confidential child abuse and neglect reports are available to law enforcement officials or other public officials who require such information to discharge their official duties.¹⁴⁵ Also, criminal justice agencies may disclose criminal history information to other criminal justice agencies, but only the Bureau of Criminal Investigation may disclose that information to a person or entity that is not a criminal justice agency.¹⁴⁶ Finally, a request from a party (or agent of a party) to litigation involving a public entity is subject to the rules of discovery.¹⁴⁷

c. Open for Limited Purposes

In addition to restricting the entities or persons who may have access to public records, specific exemptions may allow access to public records only for certain purposes. A nontreating mental health professional would have access to confidential treatment records only if necessary to conduct an investigation and report as directed by a state's attorney regarding a petition for involuntary treatment or commitment for mental illness.¹⁴⁸ Confidential records relating to government operations are nevertheless available to the state auditor when necessary in conducting an audit.¹⁴⁹ Disclosure of confidential or exempt records may also be authorized or required for statistical purposes or research projects, although any identifying information contained in the records will generally be required to be kept confidential.¹⁵⁰ Finally, while the general public may have access to records of a public entity that is a party in a pending court action or adversarial administrative proceeding, the public entity's adversary in the action or proceeding would not have such access.¹⁵¹

d. Compilations and Source Documents

Some open records exemptions apply to records which are compilations of information from other records.¹⁵² The Supreme Court has held that a law authorizing a specific fee for copies of a compilation which exceeds the entity's actual cost of making the copy does not apply to copies of the source documents used to prepare that compilation. The source documents are instead subject to the copy fee allowed in N.D.C.C.

¹⁴⁴ N.D.C.C. § 27-20-52.

¹⁴⁵ N.D.C.C. § 50-25.1-11; N.D.A.G. 94-F-03 (Jan. 27 to Henry Wessman); N.D.A.G. 88-12 (Feb. 8 to Allan Duppler).

¹⁴⁶ N.D.C.C. § 12-60-16.6.

¹⁴⁷ N.D.C.C. § 44-04-18(6).

¹⁴⁸ N.D.A.G. 94-L-267 (Oct. 7 to Henry Wessman).

¹⁴⁹ N.D.C.C. § 54-10-22.1. N.D.A.G. 95-L-1 (Jan. 17 to Robert Peterson); N.D.A.G. 94-L-305 (Nov. 3 to Gordy Smith).

¹⁵⁰ See N.D.A.G. 85-23 (June 12 to James Sperry); N.D. Admin. Code ch. 10-13-10; N.D. Admin. Code §§ 33-06-03-04 (communicable disease information); 75-01-02-01 (economic assistance recipients).

¹⁵¹ N.D.C.C. § 44-04-18(6); N.D.A.G. 2002-O-05 (Apr. 1 to Fred Strege).

¹⁵² See, e.g., N.D.C.C. §§ 12-60-16.1(3) (definition of "criminal history record information"); 39-16-03 (motor vehicle operator abstracts).

§ 44-04-18(2).¹⁵³ Similarly, the fact a compilation is a closed record does not authorize a public entity to deny a request for source documents which were used to prepare the compilation.¹⁵⁴

4. Disclosure of Closed or Confidential Information

As discussed above, disclosure of confidential records is generally a class C felony.¹⁵⁵ Whether to disclose exempt records is generally left to the discretion of the public entity. However, there may be circumstances under which a public entity is required or authorized to disclose confidential or closed records.

If not prohibited by federal law, a public entity may share confidential or closed records with any other public entity for the purpose of law enforcement or collection of debts owed to a public entity.¹⁵⁶ The recipient public entity may not use the records for other purposes and must otherwise maintain the closed or confidential nature of the records. This authority applies to governmental entities only, and does not apply to nongovernmental organizations that are expending or supported by public funds. In addition, this authority does not apply if the statute making the records confidential or closed also explains the specific circumstances under which the records may be shared with other public entities, as long as those circumstances are unique and not common to all confidential or closed records.¹⁵⁷

Disclosure of confidential or closed information also may be required by a court. If a public entity receives a valid subpoena or other court order to produce closed records, the entity must comply with the subpoena or order unless disclosure under a court order is otherwise prohibited or limited by law.¹⁵⁸ A court order, rather than a subpoena, is required to compel disclosure of confidential information that is not privileged or otherwise protected by law from court-ordered disclosure. Upon request of the public entity, the court ordering disclosure shall also issue a protective order to preserve the confidentiality of the records. Any person who discloses confidential information under this section is immune from prosecution for breaching the confidentiality of the record.

A member of a governing body of a public entity has an inherent right to have access to all closed or confidential records of the public entity, unless the records involve litigation between the member and the governing body.¹⁵⁹

¹⁵³ Robot Aided Mfg., Inc. v. North Dakota Dep't of Transp., 589 N.W.2d 187, 191 (N.D. 1999).

¹⁵⁴ N.D.A.G. 2001-O-02 (Apr. 5 to Gary Thune); N.D.A.G. 99-L-71 (Aug. 6 to Wayne Stenehjem).

¹⁵⁵ N.D.C.C. § 12.1-13-01.

¹⁵⁶ N.D.C.C. § 44-04-18.10(4).

¹⁵⁷ N.D.A.G. 98-F-28 (Nov. 23 to Carol Olson); N.D.A.G. 98-L-194 (Nov. 23 to Lyle Gallagher).

¹⁵⁸ N.D.C.C. § 44-04-18.11.

¹⁵⁹ N.D.A.G. 99-L-115 (Nov. 18 to Howard Swanson).

5. Secondary Disclosures

If confidential records are authorized by law to be disclosed to another entity, the records continue to be confidential in the possession of the receiving entity, except as otherwise provided by law.¹⁶⁰ Sometimes, a law authorizing disclosure of closed¹⁶¹ information to certain individuals or entities will restrict further disclosure of that information by the individuals or entities which receive the records.¹⁶² However, because most exceptions to the open records law are specific to the entity possessing the records, secondary disclosure of closed records by a public entity which has received the records will not be prohibited, and may be required upon request under N.D.C.C. § 44-04-18, unless a specific exception to the open records law applies to the records in the possession of the public entity.¹⁶³

6. Examples of Records Generally Not Open to the Public

a. Law Enforcement Records

This significant area of open records exemptions is discussed later in this manual in greater detail.

b. Attorney Work Product

The 1989 Legislature enacted a law declaring attorney work product exempt from the open records law. The purpose of the exemption is to conceal a public entity's attorney work product from its adversary, rather than to prevent public access to the work product.¹⁶⁴ To be exempt under this statute, attorney work product must be prepared by the attorney or at the attorney's express direction; reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency; and be prepared exclusively for litigation or adversarial administrative proceedings, or in anticipation of reasonably predictable litigation or adversarial administrative proceedings.¹⁶⁵ All three of these requirements must be met for attorney work product to be exempt under this statute.¹⁶⁶ Adversarial administrative proceedings include administrative proceedings where the administrative agency acts as a complainant, respondent, or decision maker in an adverse administrative proceeding. An administrative agency is not limited to agencies of the state, but includes local governing bodies as well.¹⁶⁷

¹⁶⁰ N.D.C.C. § 44-04-18.10(5).

¹⁶¹ N.D.C.C. § 44-04-17.1(2) (closed records means all or part of an exempt records that a public entity in its discretion has not opened to the public).

¹⁶² See, e.g., N.D.C.C. § 44-04-18.10(4), N.D.C.C. ch. 23-01.3.

¹⁶³ N.D.A.G. 2002-L-15 (Feb. 28 to Kermit Lidstrom).

¹⁶⁴ N.D.A.G. 2002-O-01 (Jan. 10 to Wade Enget).

¹⁶⁵ N.D.C.C. § 44-04-19.1(4).

¹⁶⁶ N.D.A.G. 92-F-04 (Jan. 17 to Helen Tracy).

¹⁶⁷ Edinger v. Governing Authority of Stutsman Co. Correctional Center, 695 N.W.2d 447, 454 (N.D. 2005).

The exemption for attorney work product protects the products of an attorney's thought process on legal issues posed by a pending or reasonably predictable court action or adversarial administrative proceeding. The types of records eligible for protection under the exemption are similar to those that may be protected as opinion work product under North Dakota Rule of Civil Procedure 26(b)(3).¹⁶⁸

Attorney work product is not exempt under this section once litigation or adversarial administrative proceedings are completed, including the exhaustion of all appellate remedies, unless another exception applies. Attorney work product is exempt if disclosure "would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings;" or the attorney work product "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity."¹⁶⁹ Attorney work product is not exempt if "specifically made public by the public entity receiving the work product"¹⁷⁰ or if the public entity waives the exemption by allowing its adversary in the litigation or proceeding to review the attorney work product.¹⁷¹

c. Trade Secrets, Proprietary, Commercial, and Financial Information

Like any other public record, records containing trade secrets, proprietary, commercial, or financial information are open to the public unless otherwise specifically provided by law. Thus, before the exemptions discussed below were adopted, public records containing trade secrets, proprietary, commercial, or financial information were open to the public.¹⁷² The 1989 Legislature enacted a statute declaring certain information confidential.¹⁷³ This statute was substantially amended in 1993, and currently provides in part:

Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

N.D.C.C. § 44-04-18.4(1).

The definition of "trade secret" includes a compilation prepared by a public entity, such as a list of customer names, which the entity attempts to keep secret and from which

¹⁶⁸ N.D.A.G. 2002-O-05 (Apr. 1 to Fred Strege).

¹⁶⁹ N.D.C.C. § 44-04-19.1(8).

¹⁷⁰ N.D.C.C. § 44-04-19.1(1).

¹⁷¹ N.D.A.G. 2002-O-01 (Jan. 10 to Wade Enget).

¹⁷² N.D.A.G. 85-24 (June 12 to Janet Elkin).

¹⁷³ 1989 N.D. Sess. Laws ch. 542, § 1. See Northern States Power Company v. North Dakota Public Service Commission, 502 N.W.2d 240 (N.D. 1993).

the public entity may derive economic value if the information is not publicly disclosed.¹⁷⁴ The terms "commercial" and "financial" information refer broadly to information pertaining to commerce (the buying or selling of goods or services) and finances (monetary resources).¹⁷⁵

The broad definitions of "trade secret" and "commercial information" are offset by the requirement that the records be "of a privileged nature" to be confidential under N.D.C.C. § 44-04-18.4. Trade secrets and commercial information of the [public entity] are confidential only if disclosure of the records is likely to 1) impair the [public entity's] ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the [person or entity which provided or prepared the information].¹⁷⁶

Information prepared by a public entity is not "of a privileged nature," and therefore is not confidential under this section, unless the public entity is in competition with another entity which offers similar goods or services.¹⁷⁷ Also, there can be no "competitive disadvantage" from disclosure if all competitors are required to provide the same information.¹⁷⁸

Judicial interpretations of similar language in the federal Freedom of Information Act are helpful when determining whether records are "of a privileged nature" under N.D.C.C. § 44-04-18.4.¹⁷⁹ Applying these interpretations, the Attorney General has concluded that disclosure of contract prices is part of doing business with the government and, as a matter of law, does not cause a competitive injury to the contractor.¹⁸⁰

The plain language of the exemption in N.D.C.C. § 44-04-18.4(1) for financial information of a privileged nature applies not only to financial information of a business, but also to personal financial information such as a detailed breakdown of a person's income and medical expenses.¹⁸¹ Disclosure of financial information of a person who is not in competition with another person or with a business cannot cause a competitive injury to that person. Thus, whether the information is "of a privileged nature," and

¹⁷⁴ N.D.C.C. § 44-04-18.4(2)(b); N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies).

¹⁷⁵ N.D.A.G. 98-L-17 (Mar. 2 to Carol Olson).

¹⁷⁶ N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies), citing N.D.A.G. 98-L-77 (June 17 to Douglas Johansen); N.D.A.G. 98-L-17 (Mar. 2 to Carol Olson); National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁷⁷ N.D.A.G. 98-O-22 (Oct. 16 to Roger Gress and Timothy Davies).

¹⁷⁸ N.D.A.G. 98-L-77 (June 17 to Douglas Johansen).

¹⁷⁹ N.D.A.G. 94-L-194 (Aug. 1 to Shirley Dykshoorn), citing Miami Herald Publishing Co. v. United States Small Business Administration, 670 F.2d 610 (5th Cir. 1982).

¹⁸⁰ N.D.A.G. 98-L-17 (Mar. 2 to Carol Olson).

¹⁸¹ N.D.A.G. 2000-L-107 (June 28 to Lisa Gibbens).

therefore confidential, depends on whether disclosure would impair the public entity's future ability to obtain such information.

d. Economic Development Records

Unless economic development records are confidential under N.D.C.C. § 44-04-18.4(1) or another statute, N.D.C.C. § 44-04-18.4(5) exempts from the open records law "[r]ecords and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, or expand within this state." This exemption applies only until the business or industry discloses to the public whether it will locate, relocate, or expand within the state.¹⁸²

This statute also exempts "[t]rade secrets and commercial or financial information received from a person, business, or industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance."¹⁸³ This provision does not apply to the identity of the business or to records generated by the public entity itself, unless the record generated by the public entity contains protected information provided by the business.¹⁸⁴ There is also a specific statutory exemption from the open records law for records of the North Dakota Development Fund, Incorporated.¹⁸⁵

Marketing strategies and other marketing information of a public entity engaged in economic development may be confidential as trade secrets under N.D.C.C. § 44-04-18.4.¹⁸⁶

e. Minutes and Recordings of Executive Sessions

The recording of an executive session is not an open record,¹⁸⁷ and continues to be closed to the public even if the underlying statutory basis for the executive session no longer applies.¹⁸⁸ In addition, to the extent that a public entity keeps minutes of an executive session, those minutes are treated the same as the recordings and are not open to the public. Nevertheless, a member of a governing body has a right to listen to the recording, and allowing a member access does not make the recording an open record.¹⁸⁹

¹⁸² N.D.A.G. 2000-O-07 (June 26 to Tim Priebe).

¹⁸³ See N.D.A.G. 94-L-1 (Jan. 3 to Charles Isakson).

¹⁸⁴ N.D.A.G. 2000-O-07 (June 26 to Tim Priebe).

¹⁸⁵ N.D.C.C. § 10-30.5-07; see also N.D.A.G. 95-L-253 (Nov. 8 to Bryan Dvirnak); Letter from Attorney General Nicholas Spaeth to Paul Govig (Dec. 19, 1991).

¹⁸⁶ N.D.A.G. 2001-O-11 (Sept. 13 to Greg Selbo).

¹⁸⁷ N.D.C.C. § N.D.C.C. § 44-04-19.2(5).

¹⁸⁸ N.D.A.G. 98-O-25 (Nov. 24 to Douglas Schauer).

¹⁸⁹ N.D.A.G. 99-L-115 (Nov. 18 to Howard Swanson).

f. Personal Medical Health Records

There are several exemptions to the open records law for personal medical and health records possessed by public entities. Medical records obtained as a result of enrollment in the uniform group insurance plan are confidential.¹⁹⁰ Any record of a public employee's medical treatment or use of an employee assistance program is confidential.¹⁹¹ Other medical information of public employees which has been provided in the course of employment with the state or a political subdivision is exempt.¹⁹² Records of patients at a state college or university student health service or other university system medical center or clinic are confidential.¹⁹³ Individually identifiable health information obtained by a fire department or rural fire protection district is also confidential.¹⁹⁴

The broadest exemption for personal health information is located in N.D.C.C. ch. 23-01.3. Under this chapter, disclosure of "protected health information" in the possession of a "public health authority" is generally prohibited.¹⁹⁵ "Protected health information" is defined generally as any information which either identifies an individual or could be used to identify an individual, and which relates to the individual's physical or mental condition, health care, or payment for the provision of health care.¹⁹⁶ The definition of "public health authority" includes the State Department of Health, the local public health units, and any other governmental agency which is primarily responsible for public health matters and is primarily engaged in public health activities.¹⁹⁷

g. Student Records

Student records at state higher education institutions are confidential under state law,¹⁹⁸ but the application of state law to records of elementary and secondary school students is limited.¹⁹⁹ Federal law, however, imposes extensive restrictions on the disclosure of student records. As stated earlier in this manual, exemptions from the open records law can be found in federal law as well as state law. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, "is a specific exception to the open records law."²⁰⁰ This law provides that "education records" other than directory information must

¹⁹⁰ N.D.C.C. § 54-52.1-12; N.D.A.G. 97-F-06 (Sept. 10 to Sparb Collins).

¹⁹¹ N.D.C.C. § 44-04-18.1(1).

¹⁹² N.D.C.C. § 44-04-18.1(2).

¹⁹³ N.D.C.C. § 44-04-18.16.

¹⁹⁴ N.D.C.C. § 44-04-30(3).

¹⁹⁵ N.D.C.C. §§ 23-01.3-02, 23-01.3-08.

¹⁹⁶ N.D.C.C. § 23-01.3-01(7).

¹⁹⁷ N.D.C.C. § 23-01.3-01(8).

¹⁹⁸ N.D.C.C. § 15-10-17(14).

¹⁹⁹ Student records provided to the state occupational information coordinating committee may not be disclosed by the committee. N.D.C.C. § 44-04-18.14.

²⁰⁰ N.D.A.G. 98-L-51 (Apr. 24 to Gary Gronberg).

be confidential and may not be disclosed without prior written consent.²⁰¹ Directory information is information that would generally not be considered harmful or an invasion of privacy if disclosed, and may be disclosed only after the public is given notice of the material designated by the school as directory information.²⁰² The phrase "education records" under FERPA includes a non-academic record of a student which is included in the student's permanent file.²⁰³ However, the phrase "education records" under FERPA does not include a letter to a school district from a parent of a child based on the parent's personal observations, even if the parent is also a school district employee.²⁰⁴ This exemption from the open records law for "education records" is also an exemption from the open meetings law.²⁰⁵

FERPA and a state law, N.D.C.C. § 15.1-19-14, authorize a school district to form a "law enforcement unit." Records of the unit are confidential, but may be released to the juvenile courts and law enforcement agencies, as well as to the student's parents or guardian.

h. Reports of Child Abuse or Neglect

Reports of child abuse or neglect made under N.D.C.C. ch. 50-25.1 generally are confidential.²⁰⁶ Any person who permits or encourages the unauthorized disclosure of these reports is guilty of a class B misdemeanor.²⁰⁷ However, disclosure of these reports may be made to public officials who require the information in connection with their official duties, including federal officials.²⁰⁸ In addition, "information concerning the disposition of reports of institutional child abuse or neglect" must be made available to the public.²⁰⁹

i. Disease Control Records

N.D.C.C. § 23-07-20.1 provides:

To protect the integrity of disease control records, to ensure their proper use, and to ensure efficient and proper administration of the department's disease control function, it is unlawful for any person to permit inspection of or to disclose information contained in disease control records,

²⁰¹ N.D.A.G. 94-F-28 (Sept. 2 to Bill Oban).

²⁰² N.D.A.G. 2000-O-04 (Mar. 15 to Larry Geggman); Letter from Attorney General Nicholas Spaeth to Douglas Manbeck (Mar. 13, 1990); N.D.A.G. 81-130 (Dec. 7 to Jan Dykshoorn).

²⁰³ N.D.A.G. 2000-O-04 (Mar. 15 to Larry Geggman).

²⁰⁴ N.D.A.G. 2000-O-06 (May 5 to Tom Irgens).

²⁰⁵ N.D.C.C. § 44-04-19.2(1).

²⁰⁶ N.D.C.C. § 50-25.1-11; N.D.A.G. 88-04 (Feb. 8 to Alan Duppler).

²⁰⁷ N.D.C.C. § 50-25.1-14.

²⁰⁸ N.D.A.G. 94-F-03 (Jan. 27 to Henry Wessman).

²⁰⁹ N.D.C.C. § 50-25.1-04.1; N.D.A.G. 94-F-12 (Apr. 5 to Henry Wessman).

including results of laboratory tests, or to copy or issue a copy of all or part of any such record except as authorized by rules.²¹⁰

A person who violates this section is guilty of an infraction.²¹¹

j. Motor Vehicle Records

Until August 1, 1997, most driver license and motor vehicle information was open to the public, although photographs were not.²¹² The 2001 Legislative Assembly enacted legislation prohibiting release of "personal information" in a motor vehicle record to the general public unless expressly authorized by the person to whom the information pertains.²¹³ "'Personal information' means information that identifies a person, including an individual's photograph or computerized image, social security number, driver identification number, name, address, telephone number, and medical or disability information."²¹⁴ A driver's license number may not be based on the driver's social security number.²¹⁵

k. State Agency Risk Management and Loss Control Records

The following records regarding a specific pending or reasonably predictable claim against the state or a state employee are privileged and exempt: records relating to the funds or liability reserves of the risk management fund established for the purpose of satisfying the claim, incident reports, investigation reports, and other risk management fund records of the claim.²¹⁶ Discretion to disclose these exempt records lies with the Office of Management and Budget, which shall disclose the records when disclosure will not prejudice any outstanding or reasonably predictable claim, all civil litigation or adversarial administrative proceedings regarding the claim are completed, and the applicable statute of limitations for a reasonably predictable claim has expired. Internal agency loss control committees, including the risk management motor vehicle accident review board,²¹⁷ are recognized by state law and therefore should be considered public entities,²¹⁸ but records of these committees pertaining to the risk management records described in this paragraph are exempt.²¹⁹ These exceptions are discussed in greater detail in section 4.2 of the State Risk Management Manual.

²¹⁰ See N.D. Admin. Code §§ 33-06-01-01; 33-06-05.5-01.

²¹¹ N.D.C.C. § 23-07-21(1).

²¹² N.D.C.C. § 39-06-14(1) (photographs).

²¹³ N.D.C.C. § 39-33-05.

²¹⁴ N.D.C.C. § 39-33-01(8).

²¹⁵ N.D.C.C. § 39-06-14(1).

²¹⁶ N.D.C.C. § 32-12.2-11.

²¹⁷ N.D.C.C. § 32-12.2-14.

²¹⁸ N.D.C.C. § 44-04-17.1(12)(a).

²¹⁹ N.D.C.C. § 32-12.2-12.

I. Multistate Investigations and Litigation

Records acquired by the attorney general's office from a governmental agency or a nonpublic entity are exempt if the records are necessary to monitor or enforce compliance with a law or order or to further a civil investigation or litigation by the state, considered confidential or privileged by the provider of the records, and the privilege or confidentiality has not been waived.²²⁰

m. Lists of Children

Any record that is a compilation of children's names, addresses, phone numbers, or any combination of that information is exempt.²²¹

n. Computer Programs and Computer Passwords

Computer programs contracted for, developed by, or acquired by a public entity and for which the public entity has acquired a license, copyright or patent are exempt.²²² A public entity may enter into agreements for the sale, licensing and distribution of its licensed, patented, or copyrighted computer programs. A state agency, institution, department, or board needs approval from the governor to enter into such agreements. The state's interest in the computer software may be protected against improper or unlawful use or infringement, including by taking legal action and collecting sums due for the licensing or sale of the computer program.

Computer passwords, security codes, combinations, or security-related plans used to protect electronic information or prevent access to computer and other electronic security information of a public entity are confidential.²²³

o. Financial Account Numbers

Any bank account or credit card number used by a public entity or official for making deposits, transfers, or payments is exempt.²²⁴

p. Personal Information of Licensed Professionals

The exemption for personal information of public employees includes personal information maintained by an occupational or professional licensing board of any "individual who has applied for, holds, or has held in the past an occupational or

²²⁰ N.D.C.C. § 44-04-18.12.

²²¹ N.D.C.C. § 44-04-18.13.

²²² N.D.C.C. § 44-04-18.5.

²²³ N.D.C.C. § 44-04-27.

²²⁴ N.D.C.C. § 44-04-18.9.

professional license, certificate, permit, or registration issued by a state occupational or professional board, association, or commission."²²⁵

q. Consumer Complaint Information

Personal and financial information of a person who submits a consumer complaint to a state agency, or a person on whose behalf a complaint is submitted, is exempt.²²⁶

For purposes of this section, "personal and financial information" means the home address, home telephone number, social security number, consumer report, and credit, debit, or electronic fund transfer card number of the complainant and any person on whose behalf the complaint is made, and any account number of a business or individual at a bank, brokerage, or other financial institution.

N.D.C.C. § 44-04-18.17. This exception does not apply to records regarding the nature of a consumer complaint, the name of the complainant or person on whose behalf a complaint is made, and the address and telephone number of the business that is the subject of the complaint.

r. Inmate Records

A correctional facility is not a "law enforcement" or "criminal justice" agency under the open records exceptions for juvenile records or criminal investigative or intelligence information.²²⁷ Records of juveniles who have been committed to the Division of Juvenile Services, Department of Corrections and Rehabilitation (DOCR) are confidential.²²⁸ Medical, psychological, and treatment records of inmates in the custody of the DOCR or local jails are confidential.²²⁹ Certain case history records maintained by the DOCR are exempt.²³⁰ Records of the DOCR or a local jail that identify an inmate and the inmate's location, convictions, and projected release dates are open except for inmates under protective management.²³¹ Whether records of federal inmates at state or local facilities are open to the public depends on the application of federal law and may be determined only on a case-by-case basis.²³²

²²⁵ N.D.C.C. § 44-04-18.1(4).

²²⁶ N.D.C.C. § 44-04-18.17.

²²⁷ N.D.A.G. 2000-F-09 (Feb. 28 to Frank Wald).

²²⁸ N.D.C.C. § 27-21-12.

²²⁹ N.D.C.C. §§ 12-44.1-28, 12-47-36.

²³⁰ N.D.C.C. § 12-47-36.

²³¹ N.D.C.C. §§ 12-44.1-28, 12-47-36.

²³² N.D.A.G. 2000-F-09 (Feb. 28 to Frank Wald).

s. Legislative Records and Information

The 1989 Legislature declared certain legislative records and information exempt from the open records law. These are records of a purely personal and private nature, records of attorney work product or attorney-client communication, and records that reveal the content of private communications between a legislator and any person and a record of telephone usage. However, telephone records are available to governmental entities to determine the proper use of telephone service. This exemption only applies to records of the Legislative Council and the Legislative Assembly or its members.²³³

t. Bank of North Dakota Customer Records

Most information of customers at the Bank of North Dakota is confidential.²³⁴ However, the name of an agricultural or commercial borrower of the Bank of North Dakota and the amount of financing provided to the borrower are open to the public upon request to the Industrial Commission after the loan has closed.²³⁵

u. Social Security Numbers

Social security numbers in the possession of a public entity are confidential.²³⁶ They can be released as authorized by state or federal law, for purposes of participating in retirement or other employment benefits programs, or if authorized by the individual to whom the social security number is assigned.

v. Records Regarding Security of a Public Entity, Public Officials and the Public

Certain records regarding security of public entities are exempt or confidential due to concerns that the release of this information would put the security of public buildings, public officials, or the public at risk.

Security system plans kept by a public entity are exempt from the open records law.²³⁷ This includes a wide range of records relating directly to the physical electronic security of a public facility or critical infrastructure of a public entity, including threat response plans and emergency evacuation plans.²³⁸ Not only are the plans protected, but the portions of the records, information, surveys, communications, and consultations used to produce plans relating to protecting the public or public officials are also exempt.²³⁹

²³³ N.D.C.C. § 44-04-18.6.

²³⁴ N.D.C.C. § 6-09-35. See also N.D.C.C. ch. 6-08.1.

²³⁵ N.D.C.C. § 6-08.1-02(7); N.D.A.G. 2001-F-10 (Dec. 11 to Eric Hardmeyer).

²³⁶ N.D.C.C. § 44-04-28.

²³⁷ N.D.C.C. § 44-04-24.

²³⁸ *Id.*

²³⁹ N.D.C.C. § 44-04-25.

Security related plans used to protect electronic information or to prevent access to computer or telecommunications networks of a public entity are confidential.²⁴⁰

Records of fire departments and fire protection districts such as emergency response standard operating procedures, prefire action plans, and infrastructure plans are exempt.²⁴¹

w. Autopsy Images

An autopsy photograph or other visual image or video or audio recording of an autopsy is confidential.²⁴² An autopsy image may be viewed or disclosed by a criminal justice agency for purposes of an investigation or prosecution; by a medical examiner, coroner, or physician for teaching or training purposes; to the decedents' spouse, child, parent, or sibling; or pursuant to court order.

x. Records of Individuals Receiving Economic Assistance

Individually identifiable information, including, but not limited to a person's name, address, telephone number, fax number, e-mail address, that is submitted to the Department of Human Services for the purpose of applying for or receiving assistance or services administered or supervised by the department is confidential.

Applications, income or eligibility verification, assessments, or other personal, medical, or financial data provided by persons applying for or receiving economic assistance from programs administered under the division of community services or a community action agency are exempt.²⁴³

²⁴⁰ N.D.C.C. § 44-04-27.

²⁴¹ N.D.C.C. § 44-04-30.

²⁴² N.D.C.C. § 44-04-18.18.

²⁴³ N.D.C.C. § 44-04-18.19.

Law Enforcement Records

Some of the most expansive exemptions from the open records law involve law enforcement records. Law enforcement agencies are subject to the open records law, and records of these agencies are not automatically excluded from the application of the open records law.²⁴⁴ Instead, the general presumption that public records are open applies to law enforcement records and a specific exemption from the law is required.²⁴⁵ There are, however, numerous statutory exemptions discussed below for law enforcement records that are open to the public.

1. Law Enforcement Records of a Child

A broad law enforcement exemption from the open records law is found in N.D.C.C. § 27-20-52:

Law enforcement and correctional facility records and files of a child alleged or found to be delinquent, unruly, or deprived must be kept separate from the records and files of arrests of adults. Unless a charge of delinquency is transferred for criminal prosecution under section 27-20-34, the interest of national security requires, or the court otherwise orders in the interest of the child, these records and files may not be open to public inspection; but inspection of these records and files is permitted by:

1. A juvenile court having the child before it in any proceeding;
2. Counsel for a party to the proceeding;
3. The officers of public institutions or agencies to whom the child is or may be committed;
4. Law enforcement officers of other jurisdictions when necessary for the discharge of their official duties;
5. A court in which the child is convicted of a criminal offense for the purpose of a presentence report or other dispositional proceeding, or by officials of correctional facilities to which the child is detained or committed, or by the parole board, the governor, or the pardon advisory board, if one has been appointed, in considering the child's parole or discharge or in exercising supervision over the child; and

²⁴⁴ N.D.A.G. 79-201 (Jan. 26 to John Zuger). This opinion was limited to "law enforcement" types of records that deal specifically with the investigation and detection of crime. Other records regarding the general administration of law enforcement agencies were unaffected by the opinion and continued to be open to the public. See N.D.A.G. 81-05 (Feb. 3 to F.C. Rohrich) (job applications).

²⁴⁵ Letter from Attorney General Nicholas Spaeth to Donald Rudnick (June 16, 1992); Letter from Attorney General Nicholas Spaeth to Robert Alexander (Nov. 14, 1985); Letter from Deputy Attorney General Calvin Rolfson to Brian Neugebauer (Jan. 31, 1983).

6. The professional staff of the uniform crime victims compensation program when necessary for the discharge of their duties pursuant to chapter 54-23.4; and
7. A superintendent or principal of the school in which the child is currently enrolled or of a school in which the child wishes to enroll.

Notwithstanding that law enforcement records and files of a child alleged or found to be delinquent, unruly, or deprived are not open to public inspection, nothing in this section may be construed to limit the release of general information not identifying the identity of the child.

This section applies only to records held by law enforcement agencies, not school records.²⁴⁶ "The lack of an ongoing investigation is not relevant to the statutory requirement that the records not be disclosed to the public."²⁴⁷ Rather, this exemption applies regardless of whether a record is active or inactive. As amended in 1995, this section authorizes the release of general information regarding a crime so long as the child whom the records concern is not identified. However, identifying information of a juvenile may be released for the purpose of apprehending a juvenile "who is alleged to have committed a delinquent act involving actual or threat of serious bodily injury that would constitute a felony if committed by an adult or who has escaped or left without authorization from a secure facility."²⁴⁸ Because counsel for a party to the proceeding has access to these records, this section also does not limit the information available for discovery in that proceeding.²⁴⁹ Sharing this information is also permitted between attorneys in the same county state's attorney's office.²⁵⁰

This section, as amended in 1997, is limited to files of children alleged or found to be delinquent, unruly, or deprived, and does not apply to all children or to files of other individuals that simply mention or concern a child.²⁵¹ A record is not confidential under this section unless it has a connection with a charge or finding that a child is unruly, deprived, or delinquent.²⁵²

Other statutes provide additional protection to child witnesses or victims of crime:

In order to protect the child from possible trauma resulting from publicity, the name of the child victim or witness of a crime, except as specified in subsection 2, and identifying biographical information may not appear on the indictment or any other public record. Instead, a Jane Doe or Joe Doe designation must appear in all public records. Sealed confidential records containing the child's name and necessary

²⁴⁶ N.D.A.G. 95-L-181 (July 31 to Larry Quast).

²⁴⁷ Letter from Attorney General Nicholas Spaeth to Rod Larson (June 23, 1989).

²⁴⁸ N.D.C.C. § 27-20-51.1.

²⁴⁹ See N.D.R. Crim. P. 16.

²⁵⁰ N.D.A.G. 99-L-126 (Dec. 9 to James Odegard).

²⁵¹ See 1997 N.D. Sess. Laws ch. 138, § 3.

²⁵² N.D.A.G. 2002-L-19 (Apr. 1 to Kenneth Dalstad); N.D.A.G. 2000-L-4 (Jan. 18 to Timothy Priebe).

biographical information must be kept in order to ensure that no defendant is charged twice.

N.D.C.C. § 12.1-35-03(1). As amended in 1997, this section does not apply to traffic offenses or victims of a fire, or to child victims and witnesses who have died.²⁵³

In any criminal proceeding in which the defendant is charged with a violation of chapter 12.1-20 involving a child, the court, upon the motion of the prosecuting attorney, shall conduct a hearing to determine whether the testimony of and relating to a child may be closed to the public in order to protect the child's reputation.

N.D.C.C. § 12.1-35-05.2. This section requires the court to consider several criteria before closing the proceedings.

2. Criminal Intelligence and Investigative Information

The policy discussed in the Attorney General's 1979 opinion that weighed against the public's access to public information was the need for efficient operation of law enforcement agencies in the investigation and detection of crime. This policy is now preserved by the open records exemption in N.D.C.C. § 44-04-18.7:

1. Active criminal intelligence information and active criminal investigative information are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. A criminal justice agency shall maintain a list of all files containing active criminal intelligence and investigative information which have been in existence for more than one year. With respect to each file, the list must contain the file's number or other identifying characteristic and the date the file was established. The list required under this subsection is subject to section 44-04-18. Criminal intelligence and investigative information that is not considered "active" is not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota to the extent that the information is personal information.
2. "Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information must be considered "active" as long as it is related to intelligence gathering conducted with a reasonable good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.

²⁵³ See 1997 N.D. Sess. Laws ch. 138, §§ 1, 2; N.D.A.G. 97-O-1 (Nov. 10 to Bob Harvey and Patricia Burke).

3. "Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information must be considered "active" as long as it is related to an ongoing investigation that is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future.
4. "Criminal justice agency" means any law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.
5. "Criminal intelligence and investigative information" does not include:
 - a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.
 - b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.
 - c. Conviction information, including the name of any person convicted of a criminal offense.
 - d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.
 - e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.
 - f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.
 - g. Radio log, including a chronological listing of the calls dispatched.
 - h. General registers, including jail booking information.
 - i. Arrestee photograph, if release will not adversely affect a criminal investigation.
6. "Personal information" means a person's medical information; motor vehicle operator's identification number; social security

number; and any credit, debit, or electronic fund transfer card number.

7. A computerized index created by a criminal justice agency of names included in criminal files, whether active or inactive, is an exempt record.

N.D.C.C. § 44-04-18.7. This section was amended in 1997 to make the records exempt rather than confidential and thereby give law enforcement agencies discretion to disclose the records.²⁵⁴

The information in subsection five of this statute that is not made exempt under the statute is similar to the "offense report" or "police blotter" information that the Attorney General previously concluded was not exempt from the open records law.²⁵⁵ "Criminal investigative information" applies to information compiled by a criminal justice agency. An evidence log is one example of information compiled by a criminal justice agency and is therefore exempt.²⁵⁶ Information obtained under a search warrant is another example of "criminal investigative information".²⁵⁷

Criminal intelligence or investigative information is not exempt under this statute once it becomes inactive.²⁵⁸ Thus, this inactive information is subject to the open records law unless another exemption applies.²⁵⁹ The phrase "criminal investigative information" under this statute does not include the names of people involved in a traffic accident because release of the names does not indicate whether a criminal investigation is being conducted.²⁶⁰

3. Records of Law Enforcement and Correctional Employees

Another statute also promotes efficient law enforcement activities by protecting the safety of law enforcement personnel engaged in crime investigation and detection activities.

1. Any telephone number and the home address of a juvenile court supervisor or probation officer, an employee of a law enforcement agency, employee of a state or local correctional facility, and an

²⁵⁴ See 1997 N.D. Sess. Laws ch. 381, § 10.

²⁵⁵ N.D.A.G. 79-201 (Jan. 26 to John Zuger); see also Letter from Attorney General Nicholas Spaeth to Stephen McLean (January 27, 1986).

²⁵⁶ N.D.A.G. 2005-O-13 (August 10 to the Grand Forks Police Department).

²⁵⁷ N.D.A.G. 98-F-09 (Apr. 9 to Kenneth Dalstad).

²⁵⁸ N.D.A.G. 2004-O-03 (Jan. 20 to Jamestown Police Department). Compare N.D.A.G. 2005-O-13 (August 10 to the Grand Forks Police Department)(criminal investigative information is active during prosecution of the case in court because ultimate guilt or innocence has not been determined).

²⁵⁹ N.D.A.G. 98-F-09 (Apr. 9 to Kenneth Dalstad).

²⁶⁰ N.D.A.G. 97-O-1 (Nov. 10 to Bob Harvey and Patricia Burke).

employee of the department of corrections and rehabilitation are confidential. A record containing information relating to an employee of the department of corrections and rehabilitation may be disclosed to an appropriate authority under policy established by the department of corrections and rehabilitation.

2. Records or other information that would reveal the identity, or endanger the life or physical well-being, of an undercover law enforcement officer is confidential. For purposes of this subsection, an "undercover law enforcement officer" means a full-time, salaried employee of a local or state law enforcement agency who acts surreptitiously or poses as someone other than a law enforcement officer while engaging in the investigation of a violation of law.

N.D.C.C. § 44-04-18.3(1), (2).

4. Confidential Informants

The 1997 Legislative Assembly enacted a new provision affirming the authority of law enforcement officials to maintain the confidentiality of informants other than undercover law enforcement officers:

A law enforcement officer or prosecutor, within the scope of the employment of the officer or prosecutor, may provide assurances of confidentiality to a person providing information regarding violations of the law. Any information that would identify or provide a means of identifying a confidential informant, if the identity of the informant is not otherwise publicly known, is confidential and may be disclosed only as permitted by law.

N.D.C.C. § 44-04-18.3(3).

5. Information Resulting From Child Abuse or Neglect Investigations

N.D.C.C. § 50-25.1-11 provides:

All reports made under this chapter, as well as any other information obtained, are confidential and must be made available to:

1. A physician who has before him a child whom he reasonably suspects may have been abused or neglected.
2. A person who is authorized to place a child in protective custody and has before him a child whom he reasonably suspects may have been abused or neglected and the person requires the

information in order to determine whether to place the child in protective custody.

3. Authorized staff of the department and its agents, children and advocacy centers, and appropriate state and local child protection team members, and citizen review committee members.
4. Any person who is the subject of a report; provided, however, that the identity of persons reporting under this chapter is protected.
5. Public officials and their authorized agents who require the information in connection with the discharge of their official duties.
6. A court whenever the court determines that the information is necessary for the determination of an issue before the court.
7. A person engaged in a bona fide research purpose; provided, however, that no information identifying the subjects of a report is made available to the researcher unless the information is absolutely essential to the research purpose and the department gives prior approval.
8. A person who is identified in subsection 1 of section 50-25.1-03, and who has made a report of suspected child abuse or neglect, if the child is likely to or continues to come before the reporter in the reporter's official or professional capacity.
9. Parents or a legally appointed guardian of a child who is suspected of being, or having been, abused or neglected, provided the identity of persons making reports or supplying information under this chapter is protected. Unless the information is confidential under section 44-04-18.7, when a decision is made under section 50-25.1-05.1 that services are required to provide for the protection and treatment of an abused or neglected child, the department shall make a good-faith effort to provide written notice of the decision to persons identified in this subsection. The department shall consider any known domestic violence when providing notification under this section.

Law enforcement officials would have access to these records under subsection five of this statute. Violating the confidentiality of these records is a class B misdemeanor.²⁶¹ This section does not prohibit a prosecutor from providing these reports to defense counsel as part of required discovery in criminal or juvenile court cases.²⁶²

²⁶¹ N.D.C.C. § 50-25.1-14.

²⁶² N.D.A.G. 84-31 (Aug. 17 to Tom Slorby).

6. Criminal History Information

N.D.C.C. ch. 12-60 and North Dakota Administrative Code art. 10-13 govern the reporting, collecting, maintaining, and disseminating of criminal history record information.

"Criminal history record information" includes information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other criminal charges, any dispositions arising therefrom, sentencing, correctional supervision, and release.

N.D.C.C. § 12-60-16.1(3).

The Bureau of Criminal Investigation (BCI) is the state central repository for this information.²⁶³ BCI and other criminal justice agencies are required to disclose criminal history record information to a criminal justice agency, a court, pursuant to a subpoena, or as otherwise required by law.²⁶⁴ Each local police department or county state's attorney's office is a "criminal justice agency,"²⁶⁵ but county social service boards are not.²⁶⁶ Courts and clerks of court also are not criminal justice agencies.²⁶⁷ Only BCI can provide criminal history information to other parties.²⁶⁸ BCI can disseminate criminal history record information to other parties upon written request. The request must contain certain information. Only record information of a conviction, or of a reportable event occurring in the last three years that has not been purged or sealed, may be released.²⁶⁹

The restrictions on disclosure of "criminal history record information" as a compilation do not apply to releases by local law enforcement agencies of records of specific offenses which are used as source documents for compiling criminal history record information.²⁷⁰

7. Crimes against Children and Sex Offender Registration Information

Relevant and necessary conviction and registration information must be disclosed to the public by a law enforcement agency if the individual is a moderate or high risk and the agency determines that disclosure of the information is necessary for public protection.

²⁶³ N.D.C.C. § 12-60-07(3).

²⁶⁴ N.D.C.C. § 12-60-16.5.

²⁶⁵ N.D.A.G. 95-L-74 (Mar. 21 to Wayne Solberg).

²⁶⁶ N.D.A.G. 94-L-311 (Nov. 10 to Doug Mattson).

²⁶⁷ N.D.A.G. 99-L-71 (Aug. 6 to Wayne Stenehjem).

²⁶⁸ N.D.C.C. § 12-60-16.6.

²⁶⁹ N.D.C.C. § 12-60-16.6.

²⁷⁰ N.D.A.G. 2000-L-99 (June 13 to Howard Swanson); N.D.A.G. 99-L-71 (Aug. 6 to Wayne Stenehjem).

In addition, law enforcement agencies may release upon request conviction and registration information regarding low-risk, moderate-risk, or high-risk offenders.²⁷¹ A law enforcement agency shall register juvenile offenders in the same manner as adult offenders and may release any relevant and necessary information on file if necessary to protect public health or safety.²⁷²

8. Reports of Student Alcohol and Drug Violations

Law enforcement records regarding an incident in which a student is believed to have violated certain statutes regarding alcohol or drugs must be provided to the principal of the school where the student is enrolled unless doing so would jeopardize a prolonged criminal investigation.²⁷³ "The notice must be in writing and must be provided within two weeks after an incident occurs" and the "principal shall forward the notice to the school's chemical abuse preassessment team or support team."

9. Notification of Serious Injury or Death

A law enforcement agency investigating a serious injury or death of any person is responsible for notifying the immediate family of the seriously injured or deceased person.²⁷⁴ The investigating agency may not release to the public the name of the seriously injured or deceased person until a member of the immediate family has been notified and given an opportunity to notify other immediate family members, or until twenty-four hours after positive identification of the person was made, whichever occurs first. "Immediate family" means "spouse, parent, child, sibling, or any person who regularly resides in the household of the seriously injured or deceased person."²⁷⁵

10. Accident Reports

Accident reports made by law enforcement officers are generally not privileged or confidential,²⁷⁶ and therefore are subject to the open records law.²⁷⁷ However, that portion of a law enforcement officer's accident report containing the officer's opinion regarding responsibility for the accident is confidential and may be disclosed by the director of the North Dakota Department of Transportation upon payment of a \$5 fee only to a party to the accident, a party's legal representative, or the insurer of any party to the accident if that opinion is material to a determination of liability for the accident.²⁷⁸

²⁷¹ N.D.C.C. § 12.1-32-15(13).

²⁷² N.D.C.C. § 12.1-32-15(15).

²⁷³ N.D.C.C. § 15.1-24-05.

²⁷⁴ N.D.C.C. § 39-08-10.1.

²⁷⁵ N.D.C.C. § 39-08-10.1(3).

²⁷⁶ N.D.C.C. § 39-08-13(4).

²⁷⁷ See N.D.A.G. 96-L-232 (Dec. 3 to J. Thomas Traynor).

²⁷⁸ N.D.C.C. § 39-08-13(4), (5).

"Accident reports made by persons involved in accidents or by garages" are confidential.²⁷⁹

²⁷⁹ N.D.C.C. § 39-08-14.

North Dakota Court Decisions Regarding Open Records

1. North Dakota Supreme Court Cases

Grand Forks Herald v. Lyons, 101 N.W.2d 543 (N.D. 1960).

The open records law does not apply to county court records. County courts are not “agencies of the state” as that phrase is used in the open records law. The purpose of the open records law is to make information available to the public relative to the spending of public monies and the handling of public business. What the Legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters. Applications for marriage licenses and issuance of such licenses are not records of the county court. Such records are subject to the open records law and are open to inspection provided such applications and licenses contain no information specifically made confidential by law.

State ex rel. Williston Herald, Inc. v. O’Connell, 151 N.W.2d 758 (N.D. 1967).

Judicial records, generally, are accessible to the public for any proper purpose. The public has a right to inspect records of judicial proceedings after such proceedings are completed and entered in the docket of the court. This right of inspection, however, is not unlimited. The court, in its discretion, may impound its files in a given case when justice so requires, and in that event may deny inspection thereof. Any right of inspection of the criminal records of a county court of increased jurisdiction is subject to reasonable rules and regulations regarding who may inspect the records and where and how such inspection may be made.

City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981).

Municipal personnel files are public records subject to disclosure under the open records law. The term “records” as used in the open records law is unambiguous. The Legislature intended to give the term “records” an expansive meaning. Municipal personnel files are open for inspection equally to members of the public, which includes the news media. Public records are not limited to those records which are required by law to be kept and maintained. The use of the term “record” implies that a document of some official import be retained by the public officer or employee in the course of his public duties. Disclosure of the contents of a former city police chief’s personnel file did not constitute an impermissible invasion of the former city police chief’s privacy.

Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986).

Job applications in the possession of a private consulting firm hired by the city to screen applicants for the position of chief of police are public records subject to the open records law. If the city had undertaken the task of screening applicants without hiring a private consulting firm, the job applications would clearly have been subject to the open records law. The purpose of the open records law would be thwarted if the court were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity were not public records.

Hovet v. Hebron Public School District, 419 N.W.2d 189 (N.D. 1988).

An implied exception to the open records law does not exist for a teacher's personnel file. The open records law provides that governmental records are to be open to the public except as otherwise specifically provided by law, and the Legislature has not specifically provided an exception for teacher personnel files. Allowing the public to view a teacher's personnel file would not violate the teacher's right to privacy. The federal right to privacy has not been recognized as applying to personnel records, and even if a right to privacy existed under the North Dakota Constitution, there would be no right to privacy in the personnel record of a person employed by a public agency.

Northern States Power Company v. North Dakota Public Service Commission, 502 N.W.2d 240 (N.D. 1993).

Price and volume data contained in a natural gas provider's filings with the Public Service Commission was not exempt from the open records law, although the data was a trade secret for purposes of N.D.C.C. ch. 47-25.1, the Uniform Trade Secrets Act. There is no specific, legislated exception to the open records law for public utility contracts that are required by law to be publicly filed with a regulatory agency, and such tariff filings are not exempt from disclosure as proceedings under N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act. (But see amended N.D.C.C. § 44-04-18.4.)

Gosbee v. Bendish, 512 N.W.2d 450 (N.D. 1994).

An attorney's actions seeking access to a draft lease which was in the possession of county officials was moot. The attorney had been provided with a copy of the lease pursuant to the attorney's motion in the trial court.

North Dakota Commission on Medical Competency v. Racek, 527 N.W.2d 262 (N.D. 1995).

The North Dakota Commission on Medical Competency is an arm of the Board of Medical Examiners. Although all records of the North Dakota Commission on Medical Competency are confidential and exempt from the open records law under N.D.C.C. § 43-17.1-08, the records of the Board of Medical Examiners are not exempt and are open to the public under the open records law. (But see N.D.C.C. § 44-04-18.1(4).)

Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995).

There was no majority opinion in this case. The case addresses the application of the open records law to a private, nonprofit corporation which was alleged to have been supported by public funds. The open records law, which provides for inspection of records of organizations or agencies supported in whole or in part by public funds, or expending public funds, requires that public funds be used as “support” for the organization before inspection is required, but not every transfer of public funds to a private entity is support. “Support” means something other than a quid pro quo, or bargained-for exchange of money for identifiable and specific goods and services. Where membership dues result in a quid pro quo, in sufficiently identifiable quantities, there is not “support” under the open records law which would allow public inspection of records of a nongovernmental organization, but those dues which are for the general support of the organization constitute “support” for purposes of the open records law. “Records” subject to inspection under the open records law should be given an expansive meaning and the term is not limited to those records which are required by law to be kept and maintained; once it has been determined that an entity falls under a category of organization subject to the law, then by the plain language of the open records law, all records of the entity are open to inspection. Exceptions to the open records law must be specific and may not be implied. The policy underlying the open records law is to allow taxpayers to see how state funds are used.

Borr v. McKenzie County Public School District No. 1, 560 N.W.2d 213 (N.D. 1997).

A teacher’s right to an open and accurate personnel file was not abridged by a principal’s notations in a desk journal or daily planner concerning complaints that were immediately brought to the attention of the teacher, even though the notations were not immediately transferred verbatim to the teacher’s personnel file. Notations in a principal’s private diary regarding a teacher’s performance which were never discussed with the teacher would violate the statutes prohibiting a secret personnel file, if that record was later used at a nonrenewal hearing.

Toth v. Disciplinary Board of the Supreme Court of North Dakota, 562 N.W.2d 744 (N.D. 1997).

A settlement agreement between the State Board of Chiropractic Examiners, which is a state agency, and a chiropractor was an open record. A state agency cannot circumvent the open records law through a confidentiality clause in a settlement agreement.

Adams County Record v. Greater North Dakota Association, 564 N.W.2d 304 (N.D. 1997).

The trial court properly concluded as a question of fact that a quid pro quo existed under a binding unilateral contract where GNDA published Horizons magazine and the state in return paid \$30,000 annually to GNDA. A bargained-for exchange occurred when GNDA accepted the state's unilateral offer by publishing the magazine.

Robot Aided Manufacturing, Inc. v. North Dakota Department of Transportation, 589 N.W.2d 187 (N.D. 1999).

A law authorizing a specific fee for a compilation of information does not apply to the source documents used to create the compilation. Instead, the source documents are subject to the "reasonable fee" requirement in N.D.C.C. § 44-04-18. A public entity is not required to comply with a continuing request for records and can require separate, periodic requests.

2. North Dakota District Court Cases

Radig v. Conrad, No. 24668 (N.D. 4th Dist., October 26, 1977) (Burleigh Co.).

Records indicating a state employee's deductions for deferred compensation are not public records subject to the open records law. This information relates to private financial transactions in which the public has no legitimate interest; it does not relate to whether public funds are being properly expended. Making these records public would invade the right to privacy of the state employee.

Index of Open Records Opinions - by Subject

ABUSE AND NEGLECT

- [N.D.A.G. 2003-O-10](#) Sept 4 2003, to Tri-County Intervention, Inc.
Records of domestic and sexual assault confidential.
- [N.D.A.G. 94-F-21](#) July 28 1994, to Henry Wessman
Privileged medical records may be reviewed.
- [N.D.A.G. 94-F-12.](#) April 5 1994, to Henry Wessman
Information on institutional abuse.
- [N.D.A.G. 94-F-03](#) January 27 1994, to Henry Wessman
Disclosure of abuse and neglect records to federal officials.
- N.D.A.G. Letter December 19 1991, to Lloyd Omdahl
Exchange of abuse and neglect information between
Department and county social service boards.
- N.D.A.G. Letter November 4 1991, to Wayne Sanstead
Counseling session with student.
- [N.D.A.G. 88-04](#) February 8 1988, to Alan Duppler
Waiver of confidentiality by the subject of an abuse report.
- [N.D.A.G. 84-31](#) August 17 1984, to Tom Slorby
Providing abuse reports to defense counsel.
- [N.D.A.G. 84-05](#) January 19 1984, to James Twomey
Privileged medical records may be reviewed.

AGRICULTURE

- [N.D.A.G. 98-L-77](#) June 17 1998, to Douglas Johansen
Field inspection applications and reports.
- [N.D.A.G. 95-L-243](#) October 23 1995, to Robert Peterson
Legal and tax assistance program records of the Credit
Review Board and the Agriculture Commissioner.
- N.D.A.G. 78-154 May 4 1978, to Myron Just
Potato council records.

ATTORNEY WORK PRODUCT

- [N.D.A.G. 2003-O-17](#) October 31 2003, to City of Grand Forks
Attorney work product available for disclosure after litigation
and administrative proceedings are complete.
- [N.D.A.G. 2002-O-05](#) April 1 2002, to Fred Strege

Types of records protected.

[N.D.A.G. 2002-O-01](#)

January 10 2002, to Wade Enget
Exemption is waived if shared with adversary.

[N.D.A.G. 92-04](#)

January 17 1992, to Helen Tracy
Record prepared in anticipation of an adversarial
administrative proceeding.

AUDITOR, STATE

[N.D.A.G. 95-L-01](#)

January 17 1995, to Robert Peterson
Attorney billings to Protection and Advocacy Project.

[N.D.A.G. 94-L-305](#)

November 3 1994, to Gordy Smith
Access to records of Protection and Advocacy Project for
audit purposes.

CITIES

[N.D.A.G. 2005-O-16](#)

October 6 2005, to Mayor of City of Oakes
Records given to council members by the mayor at a meeting.

[N.D.A.G. 2005-O-01](#)

January 10 2005, to City of Napoleon
Arrangement to review city ordinances.

[N.D.A.G. 2004-O-20](#)

September 7 2004, to City of Napoleon
Access to city ordinances.

[N.D.A.G. 2003-O-17](#)

October 31 2004, to City of Grand Forks
Release of attorney work product.

[N.D.A.G. 2003-O-04](#)

February 25 2003, to City of Fargo
E-mails of city commissioners and the mayor.

[N.D.A.G. 2002-O-09](#)

September 17 2002, to Van de Streek, Boughey, and Lee
City funds to reimburse Minot Area Chamber of Commerce
Task Force.

[N.D.A.G. 2002-L-41](#)

July 12 2002, to John Warcup
Real property appraisal.

[N.D.A.G. 95-L-174](#)

July 24 1995, to Robin Thompson Gordon
Client files of city attorney.

[N.D.A.G. 94-L-103](#)

April 14 1994, to Wayne Hokenson
Home improvement loan records and city checkbook (but see
N.D.A.G. 2000-L-107 June 28 to Lisa Gibbens).

[N.D.A.G. 90-32](#)

December 31 1990, to Wayne Solberg
Field notes of city assessor.

N.D.A.G. Letter

January 10 1973, to Hugh McCutcheon

Work papers of city assessor (but see N.D.A.G. 90-32 December 31 to Wayne Solberg).

COMMERCIAL INFORMATION – SEE TRADE SECRETS

COMPUTER RECORDS

- [N.D.A.G. 2005-O-05](#) March 30 2005, to North Dakota State University
Request for records in electronic format.
- [N.D.A.G. 2003-O-09](#) August 27 2003, to North Dakota Game & Fish Department
Clarification reasonable for complicated request for electronic records.
- [N.D.A.G. 2003-O-04](#) February 25 2003, to City of Fargo
E-mails of city commissioners and the mayor.
- [N.D.A.G. 98-O-22](#) October 16 1998, to Roger Gress and Timothy Davies
Excising computer records.
- N.D.A.G. Letter September 10, 1992, to Helen Tracy
Raw data in a computer database is a record.
- N.D.A.G. Letter October 8, 1991, to Charlie Whitman
Lack of authority to charge for access to open records applies to computer records.

CORRECTIONS – SEE INMATE RECORDS

COUNTIES

- [N.D.A.G. 2004-O-23](#) October 27 2004, to Stark County
Marriage licenses in county recorders office are open records.
- [N.D.A.G. 2004-O-05](#) February 17, 2004 to Grand Forks County Planning & Zoning Department
Records prepared by part-time county employee.
- [N.D.A.G. 2002-L-39](#) July 12 2002, to Linda Hickman
Wills deposited with county recorder.
- [N.D.A.G. 95-L-88](#) April 3 1995, to James Odegard
Records of medical county coroner.
- [N.D.A.G. 94-L-90](#) April 4 1994, to Jim Yockim
Settlement agreement with city official.
- [N.D.A.G. 94-L-52](#) March 7 1994, to Ronald McBeth
Confidential records remain "public" records.
- N.D.A.G. Letter July 11, 1985, to Richard Wilkes

	Noxious weed investigative reports.
<u>N.D.A.G. 82-02</u>	January 20 1982, to Herbert Engberg Reasonable office hours and fee for after-hours access can be set by the county.
N.D.A.G. 79-195	July 16 1979, to James Purdy Microfilming of county records by abstract company.
N.D.A.G. 78-124	September 7 1978, to Ronald Splitt Sale of joint interest in microfilm records is not authorized.
N.D.A.G. 71-83	December 3, 1971, to Vincent LaQua Transcript of coroner's inquest is open.
N.D.A.G. 66-49	August 22, 1966, to Eugene Kruger County officers who have possession of records and need office space.
N.D.A.G. 65-75	January 15, 1965, to John Alphson County welfare board possesses public records and must be provided a suitable building at the county seat.
N.D.A.G. 51-37	June 14, 1951 Microfilming of county records.

COURTS

<u>N.D.A.G. 2003-O-06</u>	April 25 2003, to Disciplinary Board of the ND Supreme Court Records of Disciplinary Board and Judicial Conduct Commission are court records not subject to open records law.
<u>N.D.A.G. 2002-L-19</u>	April 1 2002, to Kenneth Dalstad Jurisdiction of juvenile court.
<u>N.D.A.G. 2000-F-09</u>	February 28 2000, to Frank Wald Definition of "juvenile court".
<u>N.D.A.G. 99-L-71</u>	August 6 1999, to Wayne Stenehjem Clerks and criminal history records.
<u>N.D.A.G. 95-L-148</u>	June 21 1995, to Larry Quast Courts have discretion over access to judicial records.
<u>N.D.A.G. 94-F-18</u>	July 1 1994, to Jeff Rotering Release of child support records by clerk of court.
N.D.A.G. Letter	September 15 1992, to Ronald McBeth Release of court records regarding child support.
<u>N.D.A.G. 90-01</u>	January 4 1990, to Tom Slorby Authority of school principal to review juvenile files.

N.D.A.G. Letter	Letter to William Bohn November 17, 1987 court criminal history records.
N.D.A.G. Letter	Letter to Gail Hagerty April 15, 1985 access to conviction records.
N.D.A.G. Letter	Letter to Robert Manly December 27, 1984 access to probate records.
<u>N.D.A.G. 81-112</u>	<u>N.D.A.G. 81-112</u> October 16 to John Van Grinsven III adoption records.
N.D.A.G. 75-27	November 18 1975, to Myron Atkinson, Jr. County probate records.
N.D.A.G. 67-175	November 20 1967, to John Alphson Records of the psychiatric examinations of criminal defendants.
N.D.A.G. 49-149	May 27 1949 Dockets of a justice of the peace.

CRIMINAL HISTORY RECORDS – SEE LAW ENFORCEMENT

DENIAL OF RECORDS

<u>N.D.A.G. 2005-O-16</u>	October 6 2005, to Mayor of City of Oakes Marking record “confidential” not a basis for denial.
<u>N.D.A.G. 2004-O-11</u>	May 17 2004, to Halliday Public School District Written denial of records need not have specific legal authority.
<u>N.D.A.G. 2003-O-21</u>	December 1 2003, to Department of Human Services Entity asked for written request for records.
<u>N.D.A.G. 2003-O-09</u>	August 27 2003, to North Dakota Game & Fish Department When records are not available in requested format, identify to requestor what formats are available as soon as possible.
<u>N.D.A.G. 2000-O-13</u>	December 14 2000, to Norbert Sickler Sufficient description of legal basis for denial.
<u>N.D.A.G. 98-O-10</u>	May 7 1998, to R. James Maxson, et al Denials of nonexistent records must be in writing.
<u>N.D.A.G. 98-O-04</u>	March 3 1998, to Norbert Sickler and Franklin Appledorn A reasonable delay is not a denial.
<u>N.D.A.G. 98-O-03</u>	February 20 1998, to Glenn Giese and Lester Brackel Denial must address all requested records which are not disclosed.

[N.D.A.G. 97-O-01](#) November 10 1997, to Bob Harvey and Patricia Burke
A denial need not cite specific statute.

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

[N.D.A.G. 2005-O-13](#) August 10 2005, to Grand Forks Police Department
Information in evidence log.

[N.D.A.G. 2004-O-23](#) October 27 2004, to Stark County
Marriage licenses in county recorders office.

[N.D.A.G. 2004-L-25](#) April 1 2004, to Senator Ray Holmberg
Comprehensive booklist of required textbooks is trade secret.

[N.D.A.G. 2004-O-06](#) March 19 2004, to Job Service North Dakota
Unemployment compensation records kept by job service.

[N.D.A.G. 2003-O-11](#) September 4 2003, to State Tax Commissioner
Names of companies having agreements with North Dakota
under the Streamlined Sales Tax Project confidential.

[N.D.A.G. 2002-L-55](#) October 4 2002, to Aaron Kauter
Retirement benefits records in personnel file.

[N.D.A.G. 2002-L-39.](#) July 12 2002, to Linda Hickman
Wills deposited with county recorder.

[N.D.A.G. 2002-L-06.](#) January 29 2002, to Mike Mullen
Out-of-wedlock births and causes of death released for
statistical purposes.

[N.D.A.G. 2000-L-48](#) April 4 2000, to Warren Emmer
Inmate records.

[N.D.A.G. 99-L-115](#) November 18 1999, to Howard Swanson
Rights of member of governing body to closed or confidential
records.

[N.D.A.G. 99-L-30](#) April 5 1999, to Wade Enget
911 records.

[N.D.A.G. 98-F-28.](#) November 23 1998, to Carol Olson
Conflicts with statutes restricting further disclosure.

[N.D.A.G. 98-L-194](#) November 23 1998, to Lyle Gallagher
911 records.

[N.D.A.G. 96-L-200](#) November 7 1996, to James Anders
Transmission of confidential information under the TDD
system.

N.D.A.G. Letter December 19 1991, to Lloyd Omdahl
Exchange of abuse and neglect information between
Department and county social service boards.

N.D.A.G. 72-356	May 22 1972, to Robert Brady Access to accident reports by Unsatisfied Judgment Fund.
N.D.A.G. 62-118.	January 12 1962 Each public official must judge whether records in the official's possession are confidential.
N.D.A.G. 61-116	December 28 1961 Governor cannot compel insurance commissioner to divulge confidential communications.

ECONOMIC DEVELOPMENT RECORDS – SEE TRADE SECRETS

EXECUTIVE SESSION, RECORDINGS AND MINUTES

<u>N.D.A.G. 2004-O-13</u>	June 28 2004, to Richland Public School District Disclosure of tape of executive session.
<u>N.D.A.G. 2004-O-10</u>	May 3 2004, to Stutsman County Correctional Center Recording of closed session of a meeting.
<u>N.D.A.G. 99-L-115</u>	November 18, 1999, to Howard Swanson Rights of member of governing body to recording of executive session.
<u>N.D.A.G. 99-O-07</u>	June 29 1999, to Ed Malazdrewicz Recording is not an open record.
<u>N.D.A.G. 98-O-25</u>	November 24 1998, to Douglas Schauer Minutes of executive session; duration of closure.

FEEES FOR ACCESS AND COPIES

<u>N.D.A.G. 2005-O-05</u>	March 30 2005, to NDSU Estimate of costs not based on legally allowable charges.
<u>N.D.A.G. 2004-O-20.</u>	September 7 2004, to City of Napoleon Fee used to deter requestor.
<u>N.D.A.G. 2004-O-07</u>	April 6 2004, to Halliday Public School Fee charged not actual cost.
<u>N.D.A.G. 2003-O-09</u>	August 27 2003, to North Dakota Game & Fish Department Locating charge of \$25 per hour cannot be charged for time formatting data.
<u>N.D.A.G. 2003-O-04</u>	February 25 2003, to City of Fargo Public entity may charge \$25 per hour after the first hour for locating e-mails
<u>N.D.A.G. 2002-O-06</u>	June 27 2002, to Fabian Noack

	Excess fees.
<u>N.D.A.G. 2002-O-04</u>	February 25 2002, to Cal Rolfson Determining actual cost of copies, including labor.
<u>N.D.A.G. 2000-L-179</u>	December 29 2000, to Karen Krebsbach Search fee.
<u>N.D.A.G. 2000-O-11</u>	September 1 2000, to Linda Cooksey Fee for creating new records.
<u>N.D.A.G. 2000-L-94</u>	May 26 2000, to James Johnson Increased fees for sheriff records.
<u>N.D.A.G. 98-O-22</u>	October 16 1998, to Roger Gress and Timothy Davies Excess fees.
<u>N.D.A.G. 98-O-04</u>	March 3 1998, to Norbert Sickler & Franklin Appledorn Excess fees.
<u>N.D.A.G. 98-O-03</u>	February 20 1998, to Glenn Giese and Lester Brackel No charge for locating records.
<u>N.D.A.G. 96-L-232</u>	December 3 1996, to J. Thomas Traynor Fee for local copy of accident report (superseding N.D.A.G. 96-L-119 June 5 1996, to J. Thomas Traynor).
<u>N.D.A.G. 94-F-25</u>	August 5 1994, to Rodney Feldner Reasonable fee means actual cost to the agency of making the copies.
N.D.A.G. Letter	October 8 1991, to Charlie Whitman No access charge for computer records.
N.D.A.G. Letter	August 12 1991, to Howard Swanson Charge for copies but not for access.
<u>N.D.A.G. 89-07</u>	June 23 1989, to Nancy Jo Bateman Access fees are not permitted.
N.D.A.G. Letter	November 2 1987, to Richard Olson Reasonable charge for copies of records.
N.D.A.G. Letter	December 19 1983, to Duane Liffbrig Agency can only recover its cost of providing public records.
<u>N.D.A.G. 82-02</u>	January 20 1982, to Herbert Engberg Fee for access to records outside regular office hours.

FINANCIAL INFORMATION – SEE TRADE SECRETS

HIGHER EDUCATION

<u>N.D.A.G. 2005-O-05</u>	March 30 2005, to NDSU
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Request for records of professor in electronic format.

[N.D.A.G. 2004-L-25](#) April 1 2004, to Senator Ray Holmberg
Records of privately operated bookstore at UND.

N.D.A.G. Letter December 10, 1986, William Patrie
Privately funded university research projects.

[N.D.A.G. 85-03](#) January 22 1985, to John Richardson
Private investigator's report on a faculty member.

HUMAN SERVICES

See also: ABUSE AND NEGLECT

[N.D.A.G. 2003-O-21](#) December 1 2003, to Department of Human Services
Written request for records not prerequisite to getting the record.

[N.D.A.G. 99-L-57](#) July 6 1999, to Carol Olson
Department is not an "occupational or professional board".

[N.D.A.G. 98-L-32.](#) March 30 1998, to Carol Olson
FBI criminal history information.

[N.D.A.G. 95-L-04](#) January 17 1995, to Henry Wessman
Early child services.

[N.D.A.G. 94-L-267](#) October 7 1994, to Henry Wessman
Investigation by mental health professional under N.D.C.C. § 25-03.1-08.

N.D.A.G. 72-322 February 9 1972, to Walter Fiedler
Records of Grafton State School.

N.D.A.G. 64-239 December 30 1964, to John Alphson
Request from IRS for welfare recipient information.

N.D.A.G. 56-95 April 4 1956
Inspection by elected public officials.

INMATE RECORDS

[N.D.A.G. 2000-O-13](#) December 14 2000, to Norbert Sickler
Inmate medical records.

[N.D.A.G. 2000-L-48](#) April 4 2000, to Warren Emmer
Disclosure of confidential DOCR records.

[N.D.A.G. 2000-F-09.](#) February 28 2000, to Frank Wald
Juvenile and federal inmates.

[N.D.A.G. 2000-L-18](#) February 14 2000, to Elaine Little
DOCR records are generally confidential (see also [N.D.A.G.](#)

[2000-L-48](#) April 4 2000, to Warren Emmer).

N.D.A.G. Letter April 3 1992, to Orell Schmitz
Protection and Advocacy Project's access to inmate records.

N.D.A.G. Letter February 12 1986, to James Marion
Notice of application for parole is confidential.

JUVENILE RECORDS – SEE LAW ENFORCEMENT

LAW ENFORCEMENT

[N.D.A.G. 2005-O-13](#) August 10 2005, to Grand Forks Police Department
Case is active if prosecution is not complete.

[N.D.A.G. 2004-O-03](#) January 20 2004, to Jamestown Police Department
File not active when there was no ongoing investigation.

[N.D.A.G. 2002-L-19](#) April 1 2002, to Kenneth Dalstad
Minors who can be considered juveniles.

[N.D.A.G. 2000-L-99](#) June 13 2000, to Howard Swanson
Distinction between a compilation of a person's criminal history and source documents.

[N.D.A.G. 2000-F-09](#) February 28 2000, to Frank Wald
"Law enforcement" does not include correctional facilities.

[N.D.A.G. 2000-L-04](#) January 18 2000, to Timothy Priebe
Juvenile records must pertain to a child who was alleged or found to be delinquent, unruly, or deprived.

[N.D.A.G. 99-L-126](#) December 9 1999, to James Odegard
Sharing of confidential information within a state's attorney's office.

[N.D.A.G. 99-L-71](#) August 6 1999, to Wayne Stenehjem
Clerks and criminal history records.

[N.D.A.G. 98-F-09](#) April 9 1998, to Kenneth Dalsted
Information obtained under a warrant.

[N.D.A.G. 98-L-32](#) March 30 1998, to Carol Olson
FBI criminal history information.

[N.D.A.G. 98-F-02](#) January 8 1998, to Calvin Rolfson
Access to juvenile records by state licensing boards.

[N.D.A.G. 97-O-01](#) November 10 1997, to Bob Harvey & Patricia Burke
Identity of minor victims and witnesses of traffic offenses.

[N.D.A.G. 96-L-232](#) December 3 1996, to J. Thomas Traynor

	Local copy of accident report is open (superseding N.D.A.G. 96-L-119 June 5 1996, to J. Thomas Traynor).
N.D.A.G. 96-L-119	June 5 1996, to J. Thomas Traynor Local copy of accident report is not open (superseded by N.D.A.G. 96-L-232 December 3 1996, to J. Thomas Traynor).
N.D.A.G. 95-L-181	July 31 1995, to Larry Quast School access to juvenile records.
N.D.A.G. 95-L-74	March 21 1995, to Wayne Solberg Disclosure of criminal history record information under N.D.C.C. ch. 12-60.
N.D.A.G. 94-L-311	November 10 1994, to Doug Mattson Charge for requests by social service board for criminal history record information.
N.D.A.G. Letter	September 9 1992, to Lonnie Olson Videotape of adult arrested for DUI is a record.
N.D.A.G. Letter	June 16 1992, to Donald Rudnick Arrest information and other criminal records.
N.D.A.G. Letter	June 23 1989, to Rod Larson Records of a juvenile's death (but see N.D.A.G. 2000-F-09 February 28 2000, to Frank Wald).
N.D.A.G. 88-04	February 8 1988, to Alan Duppler Abuse and neglect investigation reports.
N.D.A.G. Letter	November 17 1987, to William Bohn Court criminal history records.
N.D.A.G. Letter	January 27 1986, to Stephen McLean Police ticket book.
N.D.A.G. Letter	November 14 1985, to Robert Alexander Statements of adult victims of criminal activity.
N.D.A.G. 79-201	January 26 1979, to John Zuger Law enforcement records in general.

MEDICAL RECORDS

N.D.A.G. 2002-L-06	January 29 2002, to Mike Mullen Vital records information.
N.D.A.G. 2000-O-13	December 14 2000, to Norbert Sickler Inmate medical records.
N.D.A.G. 94-F-21	July 28 1994, to Henry Wessman Access to privileged medical information regarding abuse

and neglect.

[N.D.A.G. 93-L-104](#)

March 22 1993, to Lyle Gallagher
Records on HIV status.

[N.D.A.G. 84-05](#)

January 19 1984, to James Twomey
Access to privileged medical information regarding abuse
and neglect.

N.D.A.G. 62-152

February 23 1962,
Access to results of blood test by the subject of the test.

N.D.A.G. 45-241

May 8 1945
Ownership of medical records.

N.D.A.G. 45-240

February 10 1945
Disclosure of fugitive's medical information to Department of
Justice.

MINUTES

[N.D.A.G. 2004-O-05](#)

February 17 2004, to Grand Forks County Planning &
Zoning Department
Minutes not prepared at time of request.

[N.D.A.G. 98-O-25](#)

November 24 1998, to Douglas Schauer
Review of draft minutes.

[N.D.A.G. 98-O-15](#)

July 2 1998, to Kevin Glatt
Whether minutes were requested is question of fact.

[N.D.A.G. 98-O-11](#)

June 8 1998, to Duane Mullenberg & Fabian Noack
Draft minutes.

[N.D.A.G. 98-O-04](#)

March 3 1998, to Norbert Sickler & Franklin Appledorn
Meeting notes and draft minutes.

NONGOVERNMENTAL ORGANIZATIONS

See also: PUBLIC ENTITY

[N.D.A.G. 2004-L-25](#)

April 1 2004, to Sen. Ray Holmberg
Barnes & Noble acting as agent of UND in operating
bookstore.

[N.D.A.G. 2003-O-10](#)

September 4 2003, to Tri-County Intervention, Inc.
Nonprofit receives money for its general support.

[N.D.A.G. 2003-O-08](#)

July 22 2003, to Dakota Center for Independent Living
Nonprofit recognized by state law and performing public
function.

[N.D.A.G. 2003-O-02](#)

February 21 2003, to James River Senior Citizen's Center
Senior citizen's center receiving unrestricted funds used for

	general support is a public entity.
<u>N.D.A.G. 2003-O-01</u>	January 30 2003, to Minot School Board Contractor making energy conservation improvements is not a public entity or agent of school district.
<u>N.D.A.G. 2002-O-09</u>	September 17 2002, to Van de Streek, Boughey, and Lee Minot Area Chamber of Commerce Task Force is supported by public funds and an agent of the city of Minot.
<u>N.D.A.G. 2001-O-11</u>	September 13 2001, to Greg Selbo Economic development corporation.
<u>N.D.A.G. 2001-O-10</u>	September 7 2001, to Lamont & Van de Streek Economic development corporation; exception to fair market value of economic development assistance.
<u>N.D.A.G. 2001-O-04</u>	May 16 2001, to Laural Forsberg Advertising firm under contract with public entity.
<u>N.D.A.G. 99-O-03</u>	April 7 1999, to Murray Sagsveen Unrestricted funds for general support.
<u>N.D.A.G. 99-O-02</u>	April 5 1999, to Steve Spilde Government self-insurance pool.
<u>N.D.A.G. 98-O-24</u>	November 23 1998, to Garrylle Stewart and Vern Bennett Unrestricted funds for general support.
<u>N.D.A.G. 98-F-19</u>	June 10 1998, to Carol Olson Payments under a "grant" agreement.
<u>N.D.A.G. 96-F-18</u>	September 13 1996, to Gerald Sveen International Peace Garden.
<u>N.D.A.G. 93-L-95</u>	March 17 1993, to Jennifer Ring GNDA is supported by public funds.
N.D.A.G. Letter	Letter to Ken Solberg August 2, 1991 government self-insurance pool

OPEN RECORDS, IN GENERAL

<u>N.D.A.G. 2005-O-16</u>	October 6 2005, to Mayor of City of Oakes Irrelevant that records were only "suggestions".
<u>N.D.A.G. 2005-O-12</u>	June 28 2005, to Oakes Park Board Proof of residency not required to receive record.
<u>N.D.A.G. 2005-O-11</u>	June 27 2005, to Grand Forks Historical Preservation Commission Requested record does not exist.
<u>N.D.A.G. 2005-O-09</u>	May 27 2005, to Twin Buttes Public School

	Cannot require request for records to be in writing.
<u>N.D.A.G. 2005-O-06</u>	May 11 2005, to Napoleon Economic Dev. Corp. May not withhold records that are preliminary or tentative.
<u>N.D.A.G. 2004-O-20</u>	September 7 2004, to City of Napoleon Duty to provide records within reasonable time.
<u>N.D.A.G. 2004-O-05</u>	February 17 2004, to Grand Forks County Planning & Zoning Department Several factors determine whether response was within reasonable time.
<u>N.D.A.G. 2003-O-21</u>	December 1 2003, to Department of Human Services Written clarification of request is not a prerequisite to receiving records.
<u>N.D.A.G. 2003-O-19</u>	November 12 2003, to Northwood Park Board Request for records at a meeting is a valid request.
<u>N.D.A.G. 2003-O-08</u>	July 22 2003, to Dakota Center for Independent Living Request is overbroad if entity cannot reasonably identify the records.
<u>N.D.A.G. 2003-O-01</u>	January 30 2003, to Minot Public School Board Document not in the public entity's possession is not a "record".
<u>N.D.A.G. 2002-L-32</u>	June 5 2002, to Mark Bachmeier Effect of legislative changes making records open that were previously exempt.
<u>N.D.A.G. 2002-O-05</u>	April 1 2002, to Fred Strege Requests from adversary to action or proceeding for privileged records; application of discovery rules.
<u>N.D.A.G. 2002-L-15.</u>	February 28 2002, to Kermit Lidstrom Distinction between affirmative disclosure and release upon request.
<u>N.D.A.G. 2001-F-10</u>	December 11 2001, to Eric Hardmeyer Bank of North Dakota customer information.
<u>N.D.A.G. 2001-O-12</u>	September 26 2001, to Randall Sickler Broad requests for records; effective date of new exceptions.
<u>N.D.A.G. 2001-O-06</u>	June 18 2001, to Norbert Sickler Definition of "copy".
<u>N.D.A.G. 2000-F-09</u>	February 28 2000, to Frank Wald Most open records exceptions are specific to each public entity; public entity cannot create open records exception by contract.

<u>N.D.A.G. 99-O-02</u>	April 5 1999, to Steve Spilde Settlement agreements.
<u>N.D.A.G. 98-O-20</u>	September 15 1998, to Mike Every and Karen Mitzel Multiple copies not required; no duty to create record.
<u>N.D.A.G. 98-L-73</u>	June 8 1998, to Jim Heck Records possessed by two entities.
<u>N.D.A.G. 98-F-13</u>	May 12 1998, to Johanna Zschomler Requests by litigants.
<u>N.D.A.G. 98-O-07</u>	April 24 1998, to Norbert Sickler Discarding records subject to a pending request.
<u>N.D.A.G. 98-O-03</u>	February 20 1998, to Glenn Giese and Lester Brackel Requests by telephone.
<u>N.D.A.G. 94-L-194</u>	August 1 1994, to Shirley Dykshoorn Three categories of records: open, exempt, and confidential.
N.D.A.G. Letter	May 18 1992, to Wayne Solberg Records in possession of third party contractor.
N.D.A.G Letter	August 13 1991, to Howard Swanson Appropriate response to request for copies of open records.
N.D.A.G Letter	July 17 1991, to Steven Tomac Hours of access to open records and permitted security measures.
N.D.A.G Letter	November 2 1987, to Richard Olson Copies of open records.
N.D.A.G Letter	July 11 1985, to Richard Wilkes Rules of evidence and procedure do not apply to records requests.
<u>N.D.A.G. 82-23</u>	Mar 25 1982, to Kent Conrad Time within which to respond to an open records request.
<u>N.D.A.G. 82-02</u>	January 20 1982, to Herbert Engberg Hours of access.
N.D.A.G. 79-106	August 8 1979, to William Gorder Meaning of "reasonable office hours".
N.D.A.G. Letter	February 23 1978, to Russell Staiger How to respond to request for open records.
N.D.A.G. Letter	November 23 1976, to Arthur Link Agreement by state agency to keep federal information confidential.

N.D.A.G. 45-26

August 13 1945
Changing public records.

PERSONAL INFORMATION

See also PUBLIC EMPLOYEES

[N.D.A.G. 99-L-57](#)

July 6 1999, to Carol Olson
Department is not an "occupational or professional board".

[N.D.A.G. 98-F-11](#)

April 30 1998, to Mark Blumer
Resumes and job applications.

[N.D.A.G. 97-L-13](#)

January 29 1997, to Gerald Sveen
Notice of procedure to withhold personal driver information.

POSSESSION OF RECORDS

[N.D.A.G. 2005-O-16](#)

October 6 2005, to Mayor of City of Oakes
Recording concerning public business and in possession of public entity subject to law.

[N.D.A.G. 2005-O-13](#)

August 10 2005, to Grand Forks Police Department
Each agency of political subdivision only responsible for records in its possession.

[N.D.A.G. 2004-O-11.](#)

May 17 2004, to Halliday Public School District
Requested preliminary budget did not exist.

[N.D.A.G. 2004-O-01](#)

January 2 2004, to Industrial Commission and Department of Commerce
Information on PACE loans not in possession of Department of Commerce.

[N.D.A.G. 2003-O-01](#)

January 30 2003, to Minot Public School Board
Document returned to owner by public entity no longer a public record.

PRELIMINARY DRAFTS AND WORKING PAPERS

[N.D.A.G. 2004-O-07](#)

April 6 2004, to Halliday Public School
Source documents that are complete in themselves are not "working papers".

[N.D.A.G. 2001-O-04](#)

May 16 2001, to Laurel Forsberg
"Right of first review" and "work in progress".

[N.D.A.G. 2001-O-02](#)

April 5 2001, to Gary Thune
Applications submitted to personnel firm are source documents and not protected.

[N.D.A.G. 98-O-04](#)

March 3 1998, to Norbert Sickler & Franklin Appledorn

Definition of "working papers" and "preliminary drafts"

[N.D.A.G. 98-O-03](#)

February 20 1998, to Glenn Giese and Lester Brackel
Completed forms are not "working papers".

PROPRIETARY INFORMATION – SEE TRADE SECRETS

PUBLIC BUSINESS

[N.D.A.G. 2005-O-16](#)

October 6 2005, to Mayor of City of Oakes
Record given to council at meeting by mayor with suggestions is public business.

[N.D.A.G. 2001-O-11](#)

September 13 2001, to Greg Selbo
Financial records of supported organization, audit reports, and personnel matters.

[N.D.A.G. 98-O-24](#)

November 23 1998, to Garrylle Stewart and Vern Bennett
Public business of supported organization includes all financial records.

[N.D.A.G. 98-L-128](#)

September 2 1998, to Jeff Rotering
"Record" requires link or association to the entity's public business.

[N.D.A.G. 94-F-19](#)

July 1 1994, to Jerome Kelsh
Records of Labor Commissioner's telephone use and travel claims are open.

N.D.A.G. Letter

December 10 1986, to William Patrie
University research projects for private firm.

PUBLIC EMPLOYEES

[N.D.A.G. 2002-L-55](#)

October 4 2002, to Aaron Kauter
Confidentiality of insurance plan participation and employer contribution to employee's insurance premiums.

[N.D.A.G. 98-F-11](#)

April 30 1998, to Mark Blumer
Resumes and job applications.

[N.D.A.G. 97-F-06](#)

September 10 1997, to Sparb Collins
Confidentiality of employee benefit records.

[N.D.A.G. 94-L-309](#)

November 9 1994, to Sparb Collins
Disclosure of confidential information by telephone to the employee.

N.D.A.G. Letter

May 18 1992, to Wayne Solberg
Confidentiality of records possessed by a third party contractor.

N.D.A.G. Letter	April 21 1988, to R.L. Rayl Privacy of personnel file.
N.D.A.G. Letter	January 11 1988, to Alan Person Ownership of PERS records in possession of group health insurance provider.
N.D.A.G. Letter	March 17 1987, to Alan Person Medical records of claims administrator are the property of PERS.
<u>N.D.A.G. 85-03</u>	January 22 1985, to John Richardson Private investigator's report on a faculty member.
<u>N.D.A.G. 81-05</u>	February 3 1981, to F.C. Rohrich Application for city police officer.

PUBLIC ENTITY

<u>N.D.A.G. 2004-L-25</u>	April 1 2004, to Sen. Ray Holmberg Barnes & Noble public entity operating bookstore as agent of UND.
<u>N.D.A.G. 2003-O-10</u>	September 4 2003, to Tri-County Intervention, Inc. Nonprofit receives money for its general support from state funds.
<u>N.D.A.G. 2003-O-08</u>	July 22 2003, to Dakota Center for Independent Living Nonprofit recognized by state law to perform governmental function.
<u>N.D.A.G. 2003-O-02</u>	February 21 2003, to James River Senior Citizen's Center Senior citizen's center is a public entity.
<u>N.D.A.G. 2003-O-01</u>	January 30 2003, to Minot Public School Board Contractor making energy conservation improvements is not a public entity.
<u>N.D.A.G. 2002-O-09</u>	September 17 2002, to Van de Streek, Boughey, and Lee Minot Area Chamber of Commerce Task Force is a public entity.
<u>N.D.A.G. 2002-L-15</u>	February 28 2002, to Kermit Lidstrom Teachers' representative organization.
<u>N.D.A.G. 2001-O-11</u>	September 13 2001, to Greg Selbo Economic development corporation is agent of public entity – nine factors.
<u>N.D.A.G. 2001-O-10</u>	September 7 2001, to Lamont and Van de Streek Economic development corporation is agent of public entity.
<u>N.D.A.G. 2001-O-04</u>	May 16 2001, to Laurel Forsberg

	Advertising firm under contract.
<u>N.D.A.G. 99-O-02</u>	April 5 1999, to Steve Spilde Government self-insurance pool.
<u>N.D.A.G. 98-O-04</u>	March 3 1998, to Norbert Sickler and Franklin Appledorn Joint enterprise of several counties.
N.D.A.G. Letter	August 2, 1991, to Ken Solberg Government self-insurance pool.
N.D.A.G. Letter	Letter to Lawrence DuBois November 20, 1987 entities created by governmental process are public entities.
N.D.A.G. Letter	Letter to Russell Staiger February 23, 1978 state planning division is a public entity.

PUBLIC SERVICE COMMISSION

N.D.A.G. 67-173	May 10 1967, to Ben Wolf The PSC is subject to N.D.C.C. § 44-04-18.
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REASONABLE FEE – SEE FEES FOR ACCESS AND COPIES

RECORD, DEFINED

<u>N.D.A.G. 2004-O-23</u>	October 27 2004, to Stark County Marriage records in county recorders office.
<u>N.D.A.G. 2003-O-04</u>	February 25 2003, to City of Fargo E-mails contained on a computer's electronic backup system are records in the possession of a public entity.
<u>N.D.A.G. 2002-L-41</u>	July 12 2002, to John Warcup City's real property appraisal.
<u>N.D.A.G. 98-L-128</u>	September 2 1998, to Jeff Rotering Link or association between record and entity's public business.
<u>N.D.A.G. 98-L-73</u>	June 8 1998, to Jim Heck Ownership not required.
<u>N.D.A.G. 98-F-11</u>	April 30 1998, to Mark Blumer Resumes and job applications.
<u>N.D.A.G. 97-F-06</u>	September 10 1997, to Sparb Collins "Record" means each item of recorded information.
<u>N.D.A.G. 94-L-103</u>	April 14 1994, to Wayne Hokenson City checkbook is an open record (but see <u>N.D.A.G. 2000-L-107</u> June 28 2000, to Lisa Gibbens).

[N.D.A.G. 94-L-90](#)

April 4 1994, to Jim Yockim
Settlement agreement with county official.

N.D.A.G. Letter

September 9 1992, to Lonnie Olson
Videotape of person arrested for DUI is a record.

N.D.A.G. Letter

October 8 1991, to Charlie Whitman
Open records law applies to computer records.

N.D.A.G. Letter

March 19 1990, to Janet Wentz
Open records law does not apply to unwritten mental or thought processes.

N.D.A.G. Letter

April 21 1988, to R.L. Rayl
A copy of pre-termination letter to an employee is a record.

N.D.A.G. Letter

March 14 1985, to Rick Bock
Definition of "record" under N.D.C.C. ch. 54-46 does not apply to the open records law.

[N.D.A.G. 85-03](#)

January 22 1985, to John Richardson
"Record" includes private investigator's report on a faculty member.

N.D.A.G. 62-118

January 12 1962
"Record" does not include every scrap of material in possession of a public official.

N.D.A.G. 58-148

June 4 1958
"Record" includes official documents, reports, and day-to-day correspondence.

RECORD RETENTION

[N.D.A.G. 2003-O-04](#)

February 25 2003, to City of Fargo
Once an e-mail is deleted from a computer's electronic backup system, it is no longer in the possession of the public entity.

N.D.A.G. 74-348

December 4 1974, to Ben Meier
Microfilming of state records.

N.D.A.G. 73-352

June 21 1973, to Ben Meier
Transferring or loaning of records to a university.

N.D.A.G. 72-343

December 1 1972, to William Guy
Disposal of records of Governor's office.

N.D.A.G. 61-171

October 3 1961
Final decision on retention rests with Secretary of State as State Records Administrator.

SCHOOLS

[N.D.A.G. 2005-O-09](#)

May 27 2005, to Twin Buttes Public School
Request for records not required to be in writing.

[N.D.A.G. 2004-O-11](#)

May 17 2004, to Halliday Public School
Request for preliminary budget that did not exist.

[N.D.A.G. 2004-O-07](#)

April 6 2004, to Halliday Public School
Must make diligent search for records and disclose all relevant to request.

[N.D.A.G. 2003-O-01](#)

January 30 2003, to Minot Public School Board
Contractor making energy conservation improvements is not a public entity of the school district.

[N.D.A.G. 2002-O-05](#)

April 1 2002, to Fred Strege
Administrative investigation files.

[N.D.A.G. 2002-L-19](#)

April 1 2002, to Kenneth Dalstad
Release of education records regarding tobacco use by minor.

[N.D.A.G. 2000-O-06](#)

May 5 2000, to Tom Irgens
Letter based on bus driver's personal observations as a parent is not a FERPA record.

[N.D.A.G. 2000-O-04](#)

March 15 2000, to Larry Gegelman
Non-academic records in student's permanent file.

[N.D.A.G. 98-L-51](#)

April 24 1998, to Gary Gronberg
Teacher journals.

[N.D.A.G. 95-L-181](#)

July 31 1995, to Larry Quast
School access to juvenile records.

[N.D.A.G. 94-L-278.](#)

October 17 1994, to Jeff Rotering
Assistance by school officials.

N.D.A.G. Letter

November 4 1991, to Wayne Sanstead
Disclosure of communications made during school counseling session.

N.D.A.G. Letter

March 13 1990, to Douglas Manbeck
Posting of deficiency list under FERPA.

N.D.A.G. Letter

January 26 1990, to Gary Knell
Student survey results.

N.D.A.G. Letter

June 6 1986, to Wayne Sanstead
Library records.

N.D.A.G. Letter

June 5 1986, to Emil Riehl
Log book of absentee ballots.

[N.D.A.G. 84-37](#)

November 14 1984, to Lee Christofferson
Interview of child at school regarding report of abuse or neglect.

[N.D.A.G. 81-130](#)

December 7 1981, to Jan Dykshoorn
Student directory information.

SECRETARY OF STATE

N.D.A.G. Letter December 18 1992, to Rosellen Sand
Financial information in reports filed with Secretary of State.

N.D.A.G. 74-606 April 8 1974, to Ben Meier
Disposition of UCC financing statements.

N.D.A.G. 72-340 October 11 1972, to Martin Gronvold
Records of conveyance of property by the State.

N.D.A.G. 62-46 May 4 1962
Annual corporate reports.

N.D.A.G. 57-148 August 22 1957
Search fees.

N.D.A.G. 56-139 August 13 1956
Review of document by Secretary of State.

TAX RECORDS

[N.D.A.G. 2003-O-11](#)

September 4 2003, to State Tax Commissioner
Names of companies contracted with North Dakota under Streamlined Sales Tax Project confidential.

N.D.A.G. 71-408 November 22 1971, to Byron Dorgan
Privacy of income tax returns.

N.D.A.G. 68-301 February 6 1968, to Edwin Sjaastad
Preservation of tax records.

N.D.A.G. 66-370 May 25 1966, to Edwin Sjaastad
Privacy of tax returns.

N.D.A.G. 64-404 July 31 1964, to Lloyd Omdahl
Disclosure of a list of taxpayers.

N.D.A.G. 58-149 March 21 1958
Disclosure of whether a person has filed a return.

TOXICOLOGIST

N.D.A.G. 73-488 November 28 1973, to N.G.S. Rao
Disclosure of deceased person's blood alcohol tests.

N.D.A.G. 67-129

April 13 1967, to Richard Prouty
Confidentiality of test results of blood specimens.

TRADE SECRETS

including economic development records, proprietary, commercial, and financial information

[N.D.A.G. 2005-O-06](#)

May 11 2005, to Napoleon Economic Dev. Corp.
Exempt economic development information may be redacted.

[N.D.A.G. 2004-L-25](#)

April 1 2004, to Sen. Ray Holmberg
Booklist compiled by Barnes & Noble a trade secret.

[N.D.A.G. 2002-O-09](#)

September 17 2002, to Van de Streek, Boughey, and Lee
Trade secrets and commercial information are of a privileged nature, competitive disadvantage if disclosed.

[N.D.A.G. 2002-O-08.](#)

July 19 2002, to David Sprynczynatyk
State Department of Transportation's contractor payroll reports - not commercial or financial information.

[N.D.A.G. 2001-O-11](#)

September 13 2001, to Greg Selbo
Summary of exceptions for economic development corporation.

[N.D.A.G. 2000-L-107](#)

June 28 2000, to Lisa Gibbens
Personal financial information.

[N.D.A.G. 2000-O-07](#)

June 26 2000, to Tim Priebe
Economic development.

[N.D.A.G. 98-O-22](#)

October 16 1998, to Roger Gress and Timothy Davies
Customer names.

[N.D.A.G. 98-L-77](#)

June 17 1998, to Douglas Johansen
Competitive injury.

[N.D.A.G. 98-L-17](#)

March 2 1998, to Carol Olson
Definitions of "commercial," "financial," and "of a privileged nature".

[N.D.A.G. 98-O-03](#)

February 20 1998, to Glenn Giese and Lester Brackel
Previous public disclosure.

[N.D.A.G. 95-L-253](#)

November 8 1995, to Bryan Dvirnak
North Dakota Development Fund records.

[N.D.A.G. 94-L-194](#)

August 1 1994, to Shirley Dykshoorn
Discretion of administrator to disclose exempt records; meaning of "privileged and confidential" records.

[N.D.A.G. 94-L-01](#)

January 3 1994, to Charles Isakson

Two agencies possessing the same exempt records each has discretion to release.

[N.D.A.G. 93-L-204](#)

June 25 1993, to Deborah Fohr Levchak
Technology Transfer, Inc..

N.D.A.G. Letter

December 18 1992, to Rosellen Sand
Annual reports to Secretary of State.

N.D.A.G. Letter

December 10 1986, to William Patrie
University research projects for private firm.

[N.D.A.G. 85-24](#)

June 12 1985, to Janet Elkin
Trade secrets under N.D.C.C. ch. 47-25.1 may still be
subject to the open records law.

TRANSPORTATION, DEPARTMENT OF

[N.D.A.G. 2002-O-08](#)

July 19 2002, to David Sprynczynatyk
Contractor payroll reports.

[N.D.A.G. 98-F-13](#)

May 12 1998, to Johanna Zschomler
Highway safety records.

[N.D.A.G. 97-L-13](#)

January 29 1997, to Gerald Sveen
Notice of procedure to withhold personal driver information.

[N.D.A.G. 96-L-232](#)

December 3 1996, to J. Thomas Traynor
Local copy of accident report (superseding [N.D.A.G. 96-L-119](#) June 5 1996, to J. Thomas Traynor).

[N.D.A.G. 96-L-119](#)

June 5 1996, to J. Thomas Traynor
Local copy of accident report (superseded by [N.D.A.G. 96-L-232](#) December 3 1996, to J. Thomas Traynor).

N.D.A.G. Letter

December 19 1983, to Duane Liffrog
Agency may only charge its actual costs for releasing
information in bulk.

N.D.A.G. 72-356

May 22 1972, to Robert Brady
Access to accident reports by Unsatisfied Judgment Fund.

N.D.A.G. 64-152

March 9 1964
Access to highway department records.

UNREASONABLE DELAY

[N.D.A.G. 2005-O-09](#)

May 27 2005, to Twin Buttes Public School
Delay of two and one half months unreasonable.

[N.D.A.G. 2005-O-05](#)

March 30 2005, to NDSU
Unreasonable delay when entity continuously tried to limit
the request.

<u>N.D.A.G. 2005-O-01</u>	January 10 2005, to City of Napoleon Unreasonable delay when city missed appointment to allow requestor access to records.
<u>N.D.A.G. 2004-O-20</u>	September 7 2004, to City of Napoleon Unreasonable delay when requestor had to ask four times for access to records.
<u>N.D.A.G. 2004-O-07</u>	April 6 2004, to Halliday Public School Delay of 12 days to send 6 records unreasonable.
<u>N.D.A.G. 2004-O-05</u>	February 17 2004, to Grand Forks County Planning & Zoning Department Delay was not unreasonable when several factors were considered.
<u>N.D.A.G. 2003-O-21</u>	December 1 2003, to Department of Human Services Five days to provide records not unreasonable.
<u>N.D.A.G. 2003-O-19</u>	November 12 2003, to Northwood Park Board Delay of four months unreasonable.
<u>N.D.A.G. 2003-O-17</u>	October 31 2003, to City of Grand Forks Couple of months to respond to a request is unreasonable.
<u>N.D.A.G. 2003-O-09</u>	August 27 2003, to North Dakota Game & Fish Department Three months to provide records unreasonable.
<u>N.D.A.G. 2002-O-08</u>	July 19 2002, to David Sprynczynatyk Delay of 37 days was unreasonable.
<u>N.D.A.G. 2002-O-06</u>	June 27 2002, to Fabian Noack Delay of month and a half was unreasonable.
<u>N.D.A.G. 2002-O-03</u>	February 11 2002, to Fabian Noack Delay of two months was unreasonable.
<u>N.D.A.G. 2001-O-12</u>	September 26 2001, to Randall Sickler Delay when requester indicates he will pick up the requested records.
<u>N.D.A.G. 2001-O-04</u>	May 16 2001, to Laurel Forsberg Delay to seek legal advice on disclosing records was unreasonable when requested records did not exist and legal advice was unnecessary.
<u>N.D.A.G. 2001-O-02</u>	April 5 2001, to Gary Thune Delay of response until the next meeting of a governing body was unreasonable.
<u>N.D.A.G. 98-O-22</u>	October 16 1998, to Roger Gress and Timothy Davies Length of delay.
<u>N.D.A.G. 98-O-20</u>	September 15 1998, to Every and Mitzel

	Delay of month and a half was unreasonable.
N.D.A.G. 98-O-19	August 12 1998, to Mullenberg and Noack Delay of more than two weeks for minutes was unreasonable.
N.D.A.G. 98-O-04	March 3 1998, to Sickler and Appledorn Delay usually measured in a few days or a week.
N.D.A.G. 98-O-03	February 20 1998, to Giese and Brackel Factors to consider.
N.D.A.G. 97-O-01	November 10 1997, to Harvey and Burke Immediate access; outside office hours.

VETERANS

N.D.A.G. 81-08	February 5 1981, to Lloyd Zander Records of the Department of Veterans' Affairs.
N.D.A.G. 68-525	November 6 1968, to Richard Thomas Discharge and separation papers.
N.D.A.G. 50-199	October 18 1950 Free copies of public records.
N.D.A.G. 49-196	April 30 1949 Free copy of discharge papers.
N.D.A.G. 45-302	December 18 1945 Recording of discharge papers.

WORKERS COMPENSATION BUREAU

N.D.A.G. 98-F-22	June 23 1998, to Lois Delmore Administrative hearings.
N.D.A.G. 96-L-16	February 8 1996, to Marv Mutzenberger Certificate of premium payment and employer's report.
N.D.A.G. 95-L-146	June 21 1995, to Marv Mutzenberger List of employers implementing a risk management program.
N.D.A.G. Letter	September 10 1992, to Helen Tracy Information open to the public under N.D.C.C. § 65-05-325.
N.D.A.G. 85-23	June 12 1985, to James Sperry Information in minute record is confidential.
N.D.A.G. 67-354	August 23 1967, to Agnes Geelan Furnishing information to vocational rehabilitation agency.
N.D.A.G. 66-502	May 9 1966, to E. Odin Sjaastad

	Awards of benefits.
N.D.A.G. 64-287	June 8, 1964 Disclosure to tax commissioner.
N.D.A.G. 62-280	November 30 1962 Release of medical information.
N.D.A.G. 42-71	September 4 1942 Confidential correspondence.

WORKING PAPERS – SEE PRELIMINARY DRAFTS AND WORKING PAPERS

Summary of Open Records Opinions – By Date Issued

Some of the Attorney General opinions listed in this Appendix may have been superseded in whole or in part by subsequent Attorney General opinions, statutory or rule changes, or court decisions.

1942 - 1980

N.D.A.G. 42-71
September 4, 1942

WORKERS COMPENSATION BUREAU

The opinion suggests that the Workmen's Compensation Bureau pass a resolution to the effect that correspondence which, in the discretion of the board, is confidential comes within the exemption of N.D.C.C. § 48-06-02. The board has the power to determine what correspondence is confidential.

N.D.A.G. 45-240
February 10, 1945

MEDICAL RECORDS

The federal Department of Justice asked the Public Health Advisory Council for information concerning the time and place that a particular party they were attempting to apprehend consulted with a physician and surgeon within this state. Inasmuch as the information desired is not in connection with the nature of the malady, consultation or advice given by the physician and surgeon, but merely for the purpose of aiding the Department of Justice in ascertaining the whereabouts of a party charged with the federal offense, there is no reason why the information could not be given. Such information could not be construed as requiring the party involved to testify against himself.

N.D.A.G. 45-241
May 8, 1945

MEDICAL RECORDS

There is no state law concerning the ownership of medical records. Undoubtedly the hospital, doctor, or the clinic that makes the record is the owner of the record subject to such use as the statutes prescribe. Various state laws address the use of medical records, including their use as evidence in court. No state law requires a hospital to keep its records for any specific length of time. It would be wise to preserve such records for a period of at least six years after the patient has been treated.

N.D.A.G. 45-26
August 13, 1945

OPEN RECORDS, IN GENERAL

Changing an original birth certificate 18 months after the birth may only be accomplished through proper court proceedings. Public records cannot be changed indiscriminately, but must remain until changed through judicial procedure.

N.D.A.G. 45-302
December 18, 1945

VETERANS

An honorably discharged veteran may have his discharge recorded without charge. He or his representative can obtain any number of certified copies of the recorded discharge, as long as the copy is needed for an application for benefits available under federal or state law.

N.D.A.G. 49-196
April 30, 1949

VETERANS

Veterans are entitled to one free certified copy of their discharge papers for each specific benefit for which they apply.

N.D.A.G. 49-149
May 27, 1949

COURTS

The dockets of a justice of the peace are public records and are not the private property of any particular justice, but must be turned over to his successor. The board of county commissioners is required to provide the duly elected and qualified county justice of the peace with reasonable and necessary dockets for his necessary and reasonable public work.

N.D.A.G. 50-199
October 18, 1950

VETERANS

Section 37-01-36, N.D.C.C., provides that any veteran or his representative shall receive a certified copy of any public record free of charge for use to apply for benefits made available by federal and state laws. This provision applies to any and every official in whose office the document of which a copy is required is now of record.

N.D.A.G. 51-37
June 14, 1951

COUNTIES

The county auditor would not abuse the discretion with which he is clothed in recording the required documents by the microfilming method. Upon the completion of the microfilming procedure, an accurate record would be in existence and the prior record could be destroyed.

N.D.A.G. 56-95
April 4, 1956

HUMAN SERVICES

Section 50-09-12, N.D.C.C., provides that upon the personal written request of any elected public official the state or county welfare board shall open for his inspection certain records. The public welfare board is authorized only to open such records to elected public officials and cannot open such records to employees of elected public officials.

N.D.A.G. 56-139
August 13, 1956

SECRETARY OF STATE

The Secretary of State must pass upon and file public documents in all other respects entitled to be passed and filed

where the notary has failed to include his typed, printed, or stamped name immediately following his signature to the jurat.

N.D.A.G. 57-148
August 22, 1957

SECRETARY OF STATE

Any time the office of the Secretary of State must secure information from records of the state or examine the records in the office in order to provide information at the request of a party, this constitutes a "search" under N.D.C.C. § 54-09-04 for which a \$2.00 fee may be assessed.

N.D.A.G. 58-149
March 21, 1958

TAX RECORDS

The Tax Commissioner is not prohibited from disclosing the fact that his office has no record of a particular person having filed an income tax return.

N.D.A.G. 58-148
June 4, 1958

RECORD, DEFINED

The language in the open records law that "all records" are public records is all-inclusive and includes records of official proceedings, reports and other documents required to be filed with an agency, as well as day-to-day correspondence of public officials on matters relating to their official duties. Such records may be inspected by members of the public, regardless of what their purpose might be.

N.D.A.G. 61-171
October 3, 1961

RECORD RETENTION

Motor vehicle titles which have been microfilmed are admissible in court and may be used for reference in accordance with the provisions of N.D.C.C. § 31-08-01.1. Under N.D.C.C. § 46-04-20, the final decision regarding what records, documents, and correspondence may be destroyed rests with the Secretary of State in his capacity as State Records Administrator. (§ 46-04-20, N.D.C.C., was repealed in 1971. The chief information officer of the state, or that officer's designee, is now the state records administrator. N.D.C.C. § 54-46-03.)

N.D.A.G. 61-116
December 28, 1961

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

The Governor has no right to demand from the Insurance Commissioner a written statement containing the names of persons spoken with and a full report of the discussions with those persons. The Commissioner is not permitted to disclose confidential communications falling within N.D.C.C. § 31-01-06(4) to the Governor or any other unauthorized party.

N.D.A.G. 62-118
January 12, 1962

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

No one may examine a public officer regarding confidential

communications which the public officer in his sound discretion believes to fall within the privilege allowed by statute, except as a court might rule otherwise. For some persons to have greater rights to information than other members of the public, there must be statutory authority. Confidential communications might be made to almost any public official in official confidence whereby a disclosure of such would result in injury to the public interests. See N.D.C.C. § 31-01-06(4).

N.D.A.G. 62-152
February 23, 1962

MEDICAL RECORDS

Section 39-20-02, N.D.C.C., provides, in part: “[u]pon the request of the person who is tested, full information concerning the test or tests taken at the direction of the law enforcement officer shall be made available to him.” The word “him” in this quoted sentence refers to the person who is tested and simply gives him the opportunity to request full information concerning the test and the results of the same.

N.D.A.G. 62-46
May 4, 1962

SECRETARY OF STATE

Annual reports of foreign and domestic corporations to the Secretary of State are not confidential. These reports are required to make certain information available to the general public. (But see N.D.C.C. § 10-19.1-146(2)).

N.D.A.G. 62-280
November 30, 1962

WORKERS COMPENSATION BUREAU

Upon request by the claimant or his attorney for information of medical examinations and reports or information in his file, the Workmen’s Compensation Bureau must release such information. If such information is not made available to the claimant, the bureau may not use such information in arriving at its determination. The bureau is not required to release medical information to a private insurance company. The bureau may do so if authorized by the claimant to release it or upon proper judicial procedure and through the process of subpoena.

N.D.A.G. 64-152
March 9, 1964

TRANSPORTATION, DEPARTMENT OF

Highway Department records must be available for inspection during reasonable office hours and reasonable regulations may be prescribed under which such inspection may be conducted. These regulations, including the charges for making copies, would apply equally to everyone.

N.D.A.G. 64-287
June 8, 1964

WORKERS COMPENSATION BUREAU

The Workmen’s Compensation Bureau was asked to supply the Tax Commissioner with a list of all employers and their

addresses to help him determine whether any income tax liability exists on the part of the employers. Since the information requested is part of the employer's report submitted to the bureau, which under N.D.C.C. § 65-04-15 may not be disclosed to anyone other than an officer or employee of the bureau, the Tax Commissioner is not entitled to this information. (But see amended N.D.C.C. § 65-04-15.)

N.D.A.G. 64-404
July 31, 1964

TAX RECORDS

The Tax Commissioner may not prepare a list of the names and addresses of each person who filed a North Dakota individual income tax return for the year 1963 for the use of a non-profit organization as a mailing list to solicit contributions from the public even though the organization is willing to pay for the cost of preparing the list.

N.D.A.G. 64-239
December 30, 1964

HUMAN SERVICES

The County Welfare Board received requests for: (1) a photocopy of a signature of a welfare recipient, for possible use in a prosecution upon a federal complaint; and (2) a request for information by the Internal Revenue Service for records concerning the amount of welfare assistance paid to certain welfare recipients. Section 50-24-31, N.D.C.C., would prohibit disclosure of the requested information. In some instances, of course, federal statutes or other state statutes might override N.D.C.C. § 50-24-31 in particular circumstances.

N.D.A.G. 65-75
January 15, 1965

COUNTIES

While some of the county records are not open to the public for inspection or may not be disseminated to the general public, all of the records are nevertheless public records. The County Welfare Board would come within this provision.

N.D.A.G. 66-502
May 9, 1966

WORKERS COMPENSATION BUREAU

The awards made by the Workmen's Compensation Bureau are not confidential but are public records. In hearing and determining claims, the bureau is acting as a quasi-judicial body. Where the bureau acts in a quasi-judicial capacity, the same rules would apply regarding making the matter public as would apply to the judicial proceedings in a court.

N.D.A.G. 66-370
May 25, 1966

TAX RECORDS

The State Fire Marshal may not require the Tax Commissioner to produce state income tax returns for inspection pursuant to N.D.C.C. § 18-01-10 because the production of same would

violate the secrecy provisions of N.D.C.C. § 57-38-57. However, the returns would have to be produced if so ordered by a court. It makes no difference whether the taxpayer of the requested return is living or dead.

N.D.A.G. 66-49
August 22, 1966

COUNTIES

Given the broad definition of public records in N.D.C.C. § 44-04-18, it would seem that a great number of non-elected county employees keep public records. The county engineer, county nurse, and county extension agent are county officers who have charge of public records, therefore, they must be provided office space within the county seat as provided in N.D.C.C. § 11-10-20.

N.D.A.G. 67-129
April 13, 1967

TOXICOLOGIST

The statute does not positively state that test results of blood specimens of accident victims are to be confidential, but the statute does state that such results are to be used only for statistical purposes. Therefore, the State Toxicologist is neither required nor authorized to release his findings of individual examinations of blood specimens to any person or agency.

N.D.A.G. 67-173
May 10, 1967
to Ben Wolf

PUBLIC SERVICE COMMISSION

The Public Service Commission, its officers and agents are included in N.D.C.C. § 44-04-18 and all correspondence made as part of the duties of their office comes within the authority of that statute. This statute does not necessarily include a requirement that litigation materials be presented to opposing counsel prior to the appropriate time in pending litigation. The Public Service Commission may make a schedule of charges concomitant with the cost of furnishing assistance in records inspection.

N.D.A.G. 67-354
August 23, 1967

WORKERS COMPENSATION BUREAU

The Workmen's Compensation Bureau may release and furnish to a recognized vocational rehabilitation agency pertinent information from the claimant's claim folder without first obtaining a release from the claimant.

N.D.A.G. 67-175
November 20, 1967

COURTS

Although the records of psychological or psychiatric evaluations of court defendants are confidential, this does not preclude the court from allowing the attorneys for the prosecution and the defense to examine the reports. The results are subject to such inspection and confrontation of witnesses as the court may permit or require in the interests of

justice. See N.D.C.C. § 50-06-05.1(15), (16).

N.D.A.G. 68-301
February 6, 1968

TAX RECORDS

In the absence of fraud, deception, or concealment, the net effect of the statute on preservation of records is that it constitutes a statute of limitations if tax returns with payments were made by the retailer for the years in question.

N.D.A.G. 68-525
November 6, 1968

VETERANS

The filing of discharges and separation papers from any of the branches of military service of the United States does not create a public record. If a person of his own volition records his discharge papers, it would appear that confidentiality would be waived. If the records are filed as received from the Department of Veterans' Affairs or other United States agency, the records would be confidential pursuant to N.D.C.C. § 37-18-11. The clerk of the district court may refuse to allow the public to examine the record of such discharges and separations if facts are not readily ascertainable from the record concerning the person or agency effecting the recordation.

N.D.A.G. 71-408
November 22, 1971

TAX RECORDS

Section 57-38-57, N.D.C.C., generally provides that income tax returns provided to the North Dakota Tax Commissioner be kept secret. The opinion addresses numerous questions regarding the Multistate Tax Compact and its relationship to the secrecy provisions of N.D.C.C. § 57-38-57, because the Multistate Tax Compact authorizes the sharing of income tax information between states.

N.D.A.G. 71-83
December 3, 1971

COUNTIES

The transcript of a county coroner's inquest is open for public inspection during reasonable office hours. This, however, does not mean that a copy must be provided free of charge.

N.D.A.G. 72-322
February 9, 1972

HUMAN SERVICES

Certain statutes allow certain records of the Grafton State School to be closed. See N.D.C.C. §§ 54-23-19, 31-01-06, and 25-16-07.

N.D.A.G. 72-356
May 22, 1972

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

The authorized representatives of the Unsatisfied Judgment Fund are entitled to access to reports filed by persons involved in accidents in order to examine portions of the reports relating to proof of financial responsibility to determine whether a

defendant was an insured motorist at the time of the accident. The confidentiality of such records under N.D.C.C. § 39-08-14 does not apply to the Unsatisfied Judgment Fund.

N.D.A.G. 72-340
October 11, 1972

SECRETARY OF STATE

A document of conveyance of real property, after being recorded with the Register of Deeds, should be presented to the Secretary of State so that the Secretary of State may fulfill his responsibilities under the provisions of N.D.C.C. § 54-09-02(4) which requires him to “record in proper books all conveyances made to the state. . . .” This does not mean that a copy of the instrument cannot be made and kept with the department directly involved. These documents constitute part of the public records and would be subject to examination, inspection, or review pursuant to the provisions of N.D.C.C. § 44-04-18.

N.D.A.G. 72-343
December 1, 1972

RECORD RETENTION

In examining the provisions of N.D.C.C. ch. 54-46, and specifically N.D.C.C. § 54-46-08, it becomes clear that the administrator is vested with the authority to grant permission for the destruction or disposition of public records. Under the existing statutes, it cannot as a matter of law be stated that the administrator must agree to transferring records of the Governor’s office to the University of North Dakota. It would also appear that a transfer without the administrator’s approval is not in accordance with the existing statutes.

N.D.A.G. Letter
January 10, 1973

CITIES

By requiring the assessment roll to be open to public inspection, N.D.C.C. § 40-19-03, it is possible to conclude that the Legislature did not intend that other papers and documents used to prepare the assessment roll should be open to the public. The ordinary “work product” used in the preparation of a public record does not necessarily become a public record. While it might appear that N.D.C.C. § 44-04-18 provides access to public records during reasonable office hours, such statute at best applies to the total assessment roll of the city, but does not necessarily go to the work cards and field notes of the assessor’s office, except to the individual property owner reviewing his own property. The assessor’s field cards and work products are not public records within the meaning of the open records law. (But see N.D.A.G. 90-124 (December 31, 1990 to Wayne Solberg).)

N.D.A.G. 73-352

RECORD RETENTION

June 21, 1973

Papers, documents, etc., deposited with the State Historical Society pursuant to the direction of the Records Management Administrator, under the authority granted by N.D.C.C. § 54-46-03, 54-46-04, and 54-46-05 may not be sent or loaned to any university for indexing or cataloging, by virtue of the Records Management Administrator's original directions for deposit with the State Historical Society. Papers, documents, etc., determined to be "subject to disposal" pursuant to N.D.C.C. § 54-46-08, and that will, after the effective date of N.D.C.C. § 54-46-08.1, be "transferred" to the State Historical Society pursuant to that section, may, at the discretion of the State Historical Society, in the absence of contrary directions from the Records Management Administrator, be sent or loaned to any university for indexing and cataloging.

N.D.A.G. 73-488
November 28, 1973

TOXICOLOGIST

Records of a deceased person's blood alcohol tests may be released for other than statistical purposes upon the issuance of a court subpoena. The state toxicologist may only release the results in compliance with the subpoena, and the fact that a subpoena has been issued does not authorize him to release the information to anyone who might subsequently request it.

N.D.A.G. 74-606
April 8, 1974

SECRETARY OF STATE RECORD RETENTION

This opinion addresses the disposition of financing statements filed pursuant to the Uniform Commercial Code. For filings made after January 1, 1974, if no continuation statement is filed, then one year after the expiration date, the financing statement could be pulled from the files and destroyed (except for those provided for in subsection 6 of section 41-09-42). For prior filings, the period of expiration and time for destruction varies. In the absence of microfilming, the filing officer may remove filing statements from the files at any time after one year after receipt of the termination statement; however, no provision is made for the destruction of the removed documents, so they should not be destroyed.

N.D.A.G. 74-348
December 4, 1974

RECORD RETENTION

State departments may microfilm their official records. See N.D.C.C. ch. 54-46.1. The head of the department must determine the time, circumstances, and when records should be microfilmed, unless or until the state records administrator has adopted rules and regulations to properly effectuate the records management act which would specify otherwise. Corporate records, the original or duplicate of which must be

filed with the Secretary of State, may be microfilmed and the original or duplicate original may be destroyed.

N.D.A.G. 75-27
November 18 1975

COURTS

Courts are not subject to the state open records law. Accordingly, access to probate records of the county court is governed by the court and by other state statutes, but not by N.D.C.C. § 44-04-18.

N.D.A.G. Letter
November 23, 1976
to Arthur Link

OPEN RECORDS, IN GENERAL

This opinion addresses whether an entity of the state, in requesting certain information from the federal government, can agree to keep that information confidential as required by federal law, in view of North Dakota's open records law. The language "except as otherwise provided by law" in North Dakota's open records law includes regulations of the federal government.

N.D.A.G. Letter to
Russell Staiger
February 23, 1978

OPEN RECORDS, IN GENERAL PUBLIC ENTITY

The State Planning Division is a governmental body or agency of the state and is governed by the open records law. There are no specific statutes which would exempt any of the records of the State Planning Division from the open records law. The open records law does not limit the right of inspection of public records to someone who demonstrates a right to know or a need to know. Members of the media have no greater or no lesser right of inspection than does the general public. There is no provision that limits the right to inspect records to only residents of this state. Any person appearing at the division's offices during reasonable office hours would have the right to examine the records. The division may not refuse access to its records even if the requesting party is knowingly utilizing only one of a series of reports which in itself would present a distorted picture of the facts or would lend itself to be used out of context to the detriment of others.

N.D.A.G. 78-154
to Myron Just
May 4, 1978

AGRICULTURE

Section § 4-10.1-17, N.D.C.C., sets forth which records of the North Dakota State Potato Council must be made available for public inspection.

N.D.A.G. 78-124
to Ronald Splitt
September 7, 1978

COUNTIES

The sale of a joint ownership interest in the master microfilm roll of the records of the county register of deeds is not authorized by the laws of this state.

N.D.A.G. 79-201
January 26 1979
to John Zuger

LAW ENFORCEMENT

Certain statutes are relevant to the openness of police records, including N.D.C.C. §§ 44-04-18, 65-13-05(5), 12.1-13-01, 27-20-52, 39-08-13, and 39-08-14. While certain statutes appear to specifically exempt some of the material that might be found in some police records, there are no North Dakota statutes that speak directly to the overall openness or confidentiality of police, law enforcement, or criminal investigation records. Law enforcement officials, in cases where records contain a mixture of confidential and nonconfidential information, should make every effort to make available upon request for public use the nonconfidential information.

N.D.A.G. 79-195
July 16 1979

COUNTIES

Under the facts stated and assumptions made, it is permissible for the county commissioners to allow an abstract company to microfilm the records of the register of deeds at the expense of the abstract company. Or, at the abstract company's request, the county commissioners may authorize the sale of microfilmed records directly to the abstract company. Any charges made by the county commissioners should be reasonable and should reflect at least an approximation of the actual cost of the service.

N.D.A.G. 79-106
August 8 1979

OPEN RECORDS, IN GENERAL

The meaning of the term "reasonable" office hours as used in N.D.C.C. § 44-04-18, takes on its meaning only with reference to the facts and circumstances involved. What is reasonable in one case, under different facts, may be less reasonable or even unreasonable.

1980 - 1989

[N.D.A.G. 81-5](#)
February 3 1981

PUBLIC EMPLOYEES

An employment application submitted by an individual for the position of city police officer is subject to N.D.C.C. § 44-04-18, North Dakota's open records law.

[N.D.A.G. 81-19](#)
February 5 1981

VETERANS

All records maintained by the Department of Veterans' Affairs are subject to the open records law of N.D.C.C. § 44-04-18, except for the information and records identified as confidential by N.D.C.C. § 37-18-11.

[N.D.A.G. 81-19](#)
February 5 1981

VETERANS

All records maintained by the Department of Veterans' Affairs are subject to the open records law of N.D.C.C. § 44-04-18, except for the information and records identified as confidential by N.D.C.C. § 37-18-11.

[N.D.A.G. 81-112](#)
October 16 1981

COURTS

An adoptive parent may obtain a certified copy of an adoption decree from the district court at any time subsequent to the adoption upon complying with the provisions of N.D.C.C. § 14-15-16 and any rules of the Social Service Board pertaining to this section.

[N.D.A.G. 81-130](#)
December 7 1981

SCHOOLS

The "except as otherwise specifically provided by law" language in the open records law includes both state laws and federal laws. Student directory records are open for public inspection pursuant to North Dakota's open records law so long as the prior notice requirements contained in the federal Family Educational Rights and Privacy Act (FERPA) at 20 U.S.C. § 1232g(a)(5)(B), are followed. Where a school board does not comply with the prior notice requirements of federal law, the student directory information is confidential and may not be released. A school board has discretion under federal law, but has no discretion under state law, in allowing the inspection of student directory records which are legally available for public inspection.

[N.D.A.G. 82-02](#)
January 20 1982

COUNTIES

FEEES FOR ACCESS AND COPIES

OPEN RECORDS, IN GENERAL

An elected county official may allow individuals access to public records under his control kept in the county courthouse, after regular office hours, and may not receive compensation directly from people allowed access but only that additional compensation as set by the board of county commissioners.

[N.D.A.G. 82-23](#)
March 25 1982

OPEN RECORDS, IN GENERAL

A state official or his employees, in response to a request for a public record, in light of the relatively limited statutory and case law exceptions to the open records law, should know what public records are covered by an exception to this law. However, in cases where it appears no prior determination has been made, a reasonable amount of time may be taken to determine whether an exception exists for that particular record.

N.D.A.G. Letter to
Duane Liffbrig
December 19, 1983

FEES FOR ACCESS AND COPIES TRANSPORTATION, DEPARTMENT OF

The state of North Dakota is not in the business of making money by selling information in public records that are available to any citizen. Insofar as any agency incurs costs and expenses associated with making public information available to the public, then the reasonable cost of doing so can be charged to the requesting party.

[N.D.A.G. 84-05](#)
January 19 1984

ABUSE AND NEGLECT MEDICAL RECORDS

Otherwise privileged information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

[N.D.A.G. 84-31](#)
August 17 1984

ABUSE AND NEGLECT

The prosecutor who provides child abuse reports to defense counsel as part of required discovery in criminal or juvenile court cases does not violate the confidentiality provisions of N.D.C.C. § 50-25.1-11.

[N.D.A.G. 84-37](#)
November 14 1984

SCHOOLS

School officials are not required to obtain parental consent before a child is interviewed at school by a protective service worker regarding a report of suspected child abuse or neglect. Diligence in obtaining parental consent for the release of student information pursuant to the federal Family Educational Rights and Privacy Act (FERPA), among other concerns, has led some schools to extend such a policy to exclude contact by outsiders with a child unless parental consent has been obtained. No law prohibits such contacts. Permitting the interviewing of children by protective service workers is not a release of educational records. School officials have a limited immunity from liability if they permit an investigative interview with a child.

N.D.A.G. Letter to
Robert Manly
December 27, 1984

COURTS

Earlier Attorney General opinions and letters on the subject of access to county probate records are no longer applicable given the repeal of N.D.C.C. chs. 27-07 and 27-08, relating to county courts and county courts of increased jurisdiction, respectively. Both of these chapters were replaced by N.D.C.C. ch. 27-07.1, relating to county courts.

[N.D.A.G. 85-03](#)

HIGHER EDUCATION

January 22 1985

PUBLIC EMPLOYEES RECORD, DEFINED

A private investigator's report, prepared at the request and in the possession of a state college, concerning a member of that college's faculty, is not exempt from North Dakota's open records law. Release of the private investigator's report would not constitute an invasion of the faculty member's right to privacy.

N.D.A.G. Letter
March 14, 1985
to Rick Bock

RECORD, DEFINED

The definition of "record" as found in N.D.C.C. ch. 54-46 is inapplicable to the open records law.

N.D.A.G. Letter
April 15, 1985
to Gail Hagerty

COURTS

The North Dakota Supreme Court has previously indicated that the open records law is not applicable to court records. The Supreme Court has indicated that the phrase "agencies of the state" in N.D.C.C. § 44-04-18 does not include the courts of the state. Any right of inspection of the respondent's criminal records is subject to reasonable rules and regulations of the court regarding who may inspect the records and where and how such inspection may be made.

[N.D.A.G. 85-23](#)
June 12 1985

WORKERS COMPENSATION BUREAU

Information contained in the Workers Compensation Bureau's Minute Record, including employers' names and amounts of premium adjustments, is open to public inspection. Confidential information, when made a part of an otherwise public record, remains confidential.

[N.D.A.G. 85-24](#)
June 12 1985

TRADE SECRETS

Chapter 47-25.1, N.D.C.C., on trade secrets does not constitute a specific exemption from the open records law. Records of a public or governmental agency containing trade secrets material are open for public inspection pursuant to North Dakota's open records law. However, trade secrets may still be protected in a formal hearing or proceeding before an administrative agency.

N.D.A.G. Letter
July 11, 1985
to Richard Wilkes

COUNTIES OPEN RECORDS, IN GENERAL

Investigative reports received concerning noxious weeds in the possession of the Burke County Weed Control Officer are subject to the open records law. However, if a criminal investigation is involved, there are certain instances in which criminal investigative reports may be withheld from public

disclosure.

N.D.A.G. Letter
November 14, 1985
to Robert Alexander

LAW ENFORCEMENT

If a criminal proceeding has not been instituted and is not contemplated, and there appears to be no other statute specifically exempting records of closed criminal files from the open records law, the inescapable conclusion is that such records are indeed subject to the open records law and may be inspected by the public at large.

N.D.A.G. Letter
January 27, 1986
to Stephen McLean

LAW ENFORCEMENT

If a police ticket book contains facts which are described in the "offense report" document named in the 1979 opinion, such information must be made available for public disclosure. On the other hand, if there are facts within the ticket book which would fit the description of "personal history and arrest records" as described in the 1979 opinion, such information should not be disclosed to the public. Where there is a mixture of such information, every effort should be made to disclose the non-confidential information.

N.D.A.G. Letter
February 12, 1986
to James Marion

INMATE RECORDS

The Notice of Application for Parole and its responses may not be disclosed directly or indirectly to anyone other than those persons listed in N.D.C.C. § 12-59-04 who are eligible to receive such information. The Parole Board or a court, in its discretion, may allow the inspection of such documents by the defendant or prisoner or his attorney whenever the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful. The decision to disclose or not disclose these particular documents is to be made by the Parole Board or a court. (But see amended N.D.C.C. § 12-59-04.)

N.D.A.G. Letter
June 5, 1986
to Emil Riehl

SCHOOLS

The clerk of a school district should maintain a log book showing those individuals who voted by absentee ballot. Pursuant to the open records law, this log book would be subject to public inspection.

N.D.A.G. Letter
June 6, 1986
to Wayne Sanstead

SCHOOLS

Section 40-38-12, N.D.C.C., excepts from the open records law certain library records. Public school libraries fall within the scope of N.D.C.C. § 40-38-12. Not all records of the public school library fall within this exception. Public school library records may also be exempt pursuant to the federal Family

Educational Rights and Privacy Act (FERPA), at 20 U.S.C. § 1232g, which defines and provides for the confidentiality of student directory information.

N.D.A.G. Letter
December 10, 1986
to William Patrie

HIGHER EDUCATION
PUBLIC BUSINESS
TRADE SECRETS

This opinion addresses the impact of the North Dakota open records law on university research projects performed for private companies, i.e., whether research information gathered pursuant to a contract between a university research center and a private company may be subject to public disclosure pursuant to North Dakota's open records law. The private entity is leasing university personnel and facilities to perform the desired research. A close scrutiny of the facts indicate that the private entity is actually paying for the use of the university personnel and its facilities. Thus, state funds are not involved in performing the private research. Therefore, in this unique situation, the open records law would not be applicable and information gathered pursuant to such contractual relationships may not be required to be publicly disclosed pursuant to the open records law.

N.D.A.G. Letter
March 17, 1987
to Alan Person

PUBLIC EMPLOYEES

Based on N.D.C.C. § 54-52.1-04.2, allowing the Public Employees Retirement System (PERS) to self-insure, and various clauses in its administrative agreement with Blue Cross Blue Shield, the medical records held by Blue Cross Blue Shield in its capacity as claims administrator for PERS are the property of the PERS. There is not a statutory exemption from the open records law for the medical records in question, therefore, they are public records. This is true even though the records may not be in the actual possession of PERS.

N.D.A.G. Letter
November 2, 1987
to Richard Olson

FEES FOR ACCESS AND COPIES
OPEN RECORDS, IN GENERAL

Public officials are urged, in complying with the open records law, to make copies available to further the spirit and intent of the open records law.

N.D.A.G. Letter
November 17, 1987
to William Bohn

COURTS
LAW ENFORCEMENT

N.D.C.C. ch. 12-60 represents an exception to the North Dakota open records statute that applies only to criminal history record information required or permitted to be retained by the Bureau of Criminal Investigation (BCI). N.D.C.C. ch.

12-60 requires criminal justice agencies to report offenses and events to the BCI, where they are compiled to form criminal history records. N.D.C.C. ch. 12-60 applies to those criminal justice agencies and to those records. It does not apply to records maintained by the courts. Any requests for access to court information should be responded to in accordance with court policies and procedures and not with reference to N.D.C.C. ch. 12-60.

N.D.A.G. Letter
November 20, 1987
to Lawrence DuBois

PUBLIC ENTITY

Entities created through public or governmental process, such as a city's Office of Economic Development, must be considered public or governmental in nature. As such, they are subject to the requirements of the open meetings and open records laws.

N.D.A.G. Letter
January 11, 1988
to Alan Person

PUBLIC EMPLOYEES

Medical records and related data in the possession of BCBS regarding the state's group health insurance program is the property of PERS. N.D.C.C. § 54-52.1-12. Section 54-52.1-12, N.D.C.C., and the administrative services agreement establish that PERS is entitled to the claims information that it has requested. There is no legal basis for BCBS' argument that this is "proprietary information" and cannot be released to PERS.

[N.D.A.G. 88-04](#)
February 8 1988

ABUSE AND NEGLECT LAW ENFORCEMENT

Section 50-25.1-11, N.D.C.C., makes confidential that law enforcement agency information which results from an investigation of child abuse or neglect. A person who is the subject of a report of child abuse or neglect waives confidentiality requirements by making the content of that report public, but only to the extent that the person has authority to waive confidentiality requirements.

[N.D.A.G. 88-04](#)
February 8 1988

ABUSE AND NEGLECT LAW ENFORCEMENT

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N.D.A.G. Letter

PUBLIC EMPLOYEES

April 21, 1988
to R.L. Rayl

RECORD, DEFINED

A copy of a pre-termination letter held by the Director of Institutions, the original of which was sent to an employee of the Director of Institutions' Office, is possessed as part of the official duties and responsibilities of a state official. Thus, the document comes within the purview of the open records law.

[N.D.A.G. 89-07](#)
June 23 1989

FEES FOR ACCESS AND COPIES

An agency subject to the public records law may not assess a charge (other than copying costs) for access to public records unless such a charge is provided for by statute.

N.D.A.G. Letter
June 23, 1989
to Rod Larson

LAW ENFORCEMENT

Section 27-20-52, N.D.C.C., provides that law enforcement records and files concerning a child are not open to public inspection except under particular circumstances. The lack of an ongoing investigation is not relevant to the statutory requirement that the records of a child not be disclosed to the public. (But see amended N.D.C.C. § 27-20-52; N.D.A.G. 2000-F-09 (February 28 2000, to Frank Wald).)

1990 - 1999

[N.D.A.G. 90-01](#)
January 4 1990

COURTS

A school principal's authority to inspect juvenile court files is not limited to those matters concerning, and to the extent necessary to enforce, the rules and regulations of the North Dakota High School Activities Association. However, a principal who wants to inspect records of a juvenile under either subdivision e or f of subsection 1 of N.D.C.C. § 27-20-51 may do so only if the court authorizes the inspection.

N.D.A.G. Letter
January 26, 1990
to Gary Knell

SCHOOLS

Because school districts are subject to the open records law and there is no specific exception for student survey questions, the survey questions are open to public inspection. (But cf. N.D.C.C. § 44-04-18.8.)

N.D.A.G. Letter
March 13, 1990
to Douglas Manbeck

SCHOOLS

The posting by a high school of a restricted privileges list or a deficiency list may jeopardize the receipt of federal funds pursuant to federal statute and regulations. The release of students' names in this manner appears to constitute the release of personally identifiable information which generally would be considered harmful or an invasion of privacy if

disclosed. The release of such information is prohibited by the federal Family Educational Rights and Privacy Act (FERPA) unless the written consent of the parents is first obtained.

N.D.A.G. Letter
March 19, 1990
to Janet Wentz

RECORD, DEFINED

North Dakota's open records law is inapplicable to mental or thought processes where no writing has occurred.

[N.D.A.G. 90-32](#)
December 31 1990

CITIES

Field notes of a city assessor are public records and must be open to public inspection.

N.D.A.G. Letter
July 17, 1991
to Steven Tomac

OPEN RECORDS, IN GENERAL

"Reasonable office hours," under the open records law, means regular or normal office hours. Thus, access to public records may not be denied during regular or normal office hours. A city may require that an employee or city official be present when access is permitted. The city may justifiably impose this requirement as a security measure to protect important city records. Nevertheless, this may not be used as an excuse to unreasonably deny access to records. However, the city may adopt a policy providing for notice to the employee if access to the records is not delayed pending that notice. If the city has two sets of records concerning city employee work hours, both sets are public records.

N.D.A.G. Letter
August 2, 1991
to Ken Solberg

NONGOVERNMENTAL ORGANIZATIONS

PUBLIC ENTITY

NDIRF falls within the meaning of the term "agencies" as used in N.D.C.C. §§ 44-04-19 and 44-04-18. The governing body of a government self-insurance pool supported by public funds and spending public funds performs a government function. Accordingly, NDIRF is subject to the open meetings and open records laws. When information made confidential under N.D.C.C. § 26.1-23.1-06 is discussed at a meeting which would otherwise be open to the public, that portion of the meeting relating to the confidential information may be closed. This exception should be narrowly construed in a manner that does not frustrate the general policies providing for open meetings and access to public records.

N.D.A.G. Letter
August 13, 1991
to Howard Swanson

FEES FOR ACCESS AND COPIES

OPEN RECORDS, IN GENERAL

Public officials should make copies of public records available upon request and a request may not be denied because it involves a substantial number of copies or because the same

individual makes multiple requests.

N.D.A.G. Letter
October 8, 1991
to Charlie Whitman

COMPUTER RECORDS
FEES FOR ACCESS AND COPIES
RECORD, DEFINED

Previous Attorney General opinions which conclude that a public entity may assess a reasonable charge for copying costs but may not assess an additional fee for access to public records unless such a charge is statutorily provided, apply to all public information and all public records, including information stored in computers.

N.D.A.G. Letter
November 4, 1991
to Wayne Sanstead

ABUSE AND NEGLECT SCHOOLS

Reading N.D.C.C. § 31-01-06.1 and ch. 50-25.1 together leads to the conclusion that elementary and secondary school counselors in North Dakota may refuse to divulge communications with their clients which occurred during a counseling session for any purposes other than the mandatory child abuse or neglect reports.

N.D.A.G. Letter
December 19, 1991
to Lloyd Omdahl

ABUSE AND NEGLECT
DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

The authority to exchange information between the Department of Human Services and county social service boards and other entities in connection with child abuse or neglect investigations and follow-up protective services is provided by N.D.C.C. § 50-25.1-11. The Department of Human Services and county social service boards, as well as other entities, must cooperate and exchange information in connection with programs providing protective services for children in carrying out the purpose of N.D.C.C. ch. 50-25.1.

[N.D.A.G. 92-04](#)
January 17 1992

ATTORNEY WORK PRODUCT

Attorney work product prepared in anticipation of an adversarial administrative proceeding is exempt from disclosure under N.D.C.C. § 44-04-19.1(3)(c) if the requirements of N.D.C.C. § 44-04-19.1(3)(a) and (b) are also met. Attorney work product prepared prior to the effective date of the statute is exempt from disclosure when the request for disclosure is made after the effective date of the statute.

N.D.A.G. Letter
April 3, 1992
to Orell Schmitz

INMATE RECORDS

The Protection and Advocacy Project (P&A) is not authorized by N.D.C.C. § 12-47-36 to review a prison inmate's records by virtue of a release of information provided P&A by the inmate. Also, N.D.C.C. ch. 25-01.3 does not generally give P&A

access to the penitentiary.

N.D.A.G. Letter
May 18, 1992
to Wayne Solberg

OPEN RECORDS, IN GENERAL PUBLIC EMPLOYEES

The confidentiality provided for public employee medical and employee assistance records under N.D.C.C. § 44-04-18.1 does not prohibit a third party contractor from disclosing records which are the subject of a contract between it and a governmental entity to that governmental entity. The statute regulates the conduct of the governmental entity and its duty to maintain the confidentiality of specific personnel records. If the records are in the hands of the governmental entity and are declared by a specific statute to be confidential, then the governmental entity is required to respect that confidentiality. Violations of confidentiality statutes are punishable as a class C felony. N.D.C.C. § 12.1-13-01.

N.D.A.G. Letter
June 16, 1992
to Donald Rudnick

LAW ENFORCEMENT

Section 44-04-18.7, N.D.C.C., declares that active criminal intelligence information and active criminal investigative information are exempt from N.D.C.C. § 44-04-18, the open records law. However, information, including a description of an arrested person, facts concerning the arrests, conviction information, disposition of warrants, and other information concerning a criminal offense, is not exempt from the open records law. N.D.C.C. § 44-04-18.7(5). Thus, basic information concerning a reportable event of an arrest contained in a police log or other information at a local law enforcement agency ordinarily would not be subject to the nondisclosure exceptions under the open records law.

N.D.A.G. Letter
September 9, 1992
to Lonnie Olson

LAW ENFORCEMENT RECORD, DEFINED

Since the term "records" in N.D.C.C. § 44-04-18 must be given an expansive meaning, a videotape of an adult who was arrested for driving under the influence that is in the possession of a public agency or official and no longer falls within the exception of N.D.C.C. § 44-04-18.7 is accessible to the public under the North Dakota open records law.

N.D.A.G. Letter
September 10, 1992
to Helen Tracy

COMPUTER RECORDS WORKERS COMPENSATION BUREAU

If electronically stored information in computer records was not considered a public record, government agencies could circumvent open-records laws by storing records on computer systems. Therefore, raw data which exists in uncompiled and

electronically stored form constitutes a public record to the extent that it consists of the specified information required to be made available to the public under N.D.C.C. § 65-05-32(5).

N.D.A.G. Letter
September 15, 1992
to Ronald McBeth

COURTS

The clerk of court and the county state's attorney do not have authority to limit access to public information in court records with respect to child support proceedings. Any request by a custodial parent that the custodial parent's address or telephone number not be disclosed should be addressed to the district court with jurisdiction in the matter. The court may then determine if the circumstances furnish a lawful basis for the issuance of an order restricting access to that portion of the court's file which contains the custodial parent's current address and telephone number.

N.D.A.G. Letter
December 18, 1992
to Rosellen Sand

SECRETARY OF STATE

TRADE SECRETS

Section 44-04-18.4, N.D.C.C., relating to the confidentiality of commercial and financial information, does not provide an exception to the open records law for financial information provided in annual reports filed with the Secretary of State pursuant to N.D.C.C. § 10-23-01. (But see N.D.C.C. § 10-19.1-146(2)).

[N.D.A.G. 93-L-95](#)
March 17 1993

NONGOVERNMENTAL ORGANIZATIONS

The Greater North Dakota Association (GNDA) is supported in part by public funds and is, therefore, an entity subject to the open records law. All of the records of the GNDA, and not just those that relate to the use of public funds, are subject to the open records law and may be accessed by members of the public during reasonable office hours. (But see *Adams County Record v. Greater North Dakota Association*, 564 N.W.2d 304 (N.D. 1997) and *Adams County Record v. Greater North Dakota Association*, 529 N.W.2d 830 (N.D. 1995).)

[N.D.A.G. 93-L-104](#)
March 22 1993

MEDICAL RECORDS

Various North Dakota laws address information regarding a person's Human Immunodeficiency Virus (HIV) status. The confidentiality of information regarding a person's HIV status, under North Dakota law, to a large extent depends on the source of the information.

[N.D.A.G. 93-L-204](#)
June 25 1993

TRADE SECRETS

The confidentiality of commercial and financial information of a Technology Transfer, Inc., applicant is provided for by

N.D.C.C. § 10-30.4-06.

[N.D.A.G. 94-L-1](#)

January 3 1994

TRADE SECRETS

The loan document and guaranty related to the community development block grant awarded to Mercer County for the Fish 'N Dakota project constitute commercial or financial information received from a person or business applying for or receiving financing assistance and are therefore exempt under N.D.C.C. § 44-04-18.2 from the open records law.

[N.D.A.G. 94-L-03](#)

January 27 1994

ABUSE AND NEGLECT

The Department of Human Services may transfer reports, as well as other information obtained, concerning an investigation made pursuant to N.D.C.C. ch. 50-25.1 to appropriate officials within the United States Department of Interior who require such information in connection with the discharge of their official duties concerning the Wahpeton Indian School.

[N.D.A.G. 94-L-52](#)

March 7 1994

COUNTIES

The fact that certain records are confidential and otherwise not open for public inspection does not render the records "nonpublic." Records retained by officials in charge of the Family Planning Branch of the Richland County Public Health Department relate to the performance of a governmental or proprietary function of the county. Accordingly, such records constitute public records.

[N.D.A.G. 94-L-90](#)

April 4 1994

COUNTIES

RECORD, DEFINED

A county entered into a settlement agreement with the county auditor, whereby the county auditor would resign and receive payments from the county after the date of resignation. To the extent that the terms and conditions of any settlement are reduced to writing, they constitute a public record within the meaning of the North Dakota open records statute. There appear to be no statutory exceptions which would exempt such an agreement from the provisions of North Dakota's open records law.

[N.D.A.G. 94-F-12](#)

April 5 1994

ABUSE AND NEGLECT

The State Child Protection Team appointed by the Department of Human Services must provide to the public information reflecting the disposition of reports of institutional child abuse or neglect received by the Department, provided the identity of the persons reporting the child abuse or neglect, the children, and their parents, is protected. The information reflecting the

disposition of reports of institutional child abuse or neglect provided to the public may include a description of the investigation, the findings of the investigation, the determination whether there exists probable cause to believe that child abuse or neglect is indicated, and any recommendations made by the State Child Protection Team. The description must be adequate to fairly advise the public that corrective action is not necessary or that proper corrective action has been taken to protect the health and welfare of children.

[N.D.A.G. 94-L-103](#)

April 14 1994

CITIES
RECORD, DEFINED

Because no specific statutory or constitutional exemption (including a right to privacy) to the open records law exists regarding home improvement loan program records maintained by a political subdivision, all such records are public records, open and accessible for inspection by the public during reasonable office hours. A city checkbook is an open record. (But see N.D.C.C. § 44-04-18.9 (account numbers); N.D.A.G. 2000-L-107 (June 28 to Lisa Gibbens) (personal financial information).)

[N.D.A.G. 94-F-18](#)

July 1 1994

COURTS

The clerk of district court is required to release en masse to the news media child support records and files for review unless either the Supreme Court or the district court has adopted rules restricting who may review the records or the time, place, or manner of inspection or the district judge has impounded the files and records and ordered they may not be inspected. The clerk of district court may not release for review or public inspection any papers or records concerning a paternity determination, other than the final judgment, unless the consent of the court and all interested persons has been obtained or upon an order of the court for good cause shown in exceptional cases.

[N.D.A.G. 94-F-19](#)

July 1 1994

PUBLIC BUSINESS

Records relating to the State Labor Commissioner's payroll, accounting, telephone usage, and employee travel claims are public records open and available for inspection under North Dakota's open records law.

[N.D.A.G. 94-F-21](#)

July 28 1994

ABUSE AND NEGLECT
MEDICAL RECORDS

Otherwise privileged medical information concerning the

treatment of a child at a medical facility is available for review to determine if there is probable cause to believe child abuse or neglect is indicated.

[N.D.A.G. 94-L-194](#)

August 1 1994

OPEN RECORDS, IN GENERAL
TRADE SECRETS

To determine whether particular information is confidential commercial or financial information under N.D.C.C. § 44-04-18.4, it is beneficial to resort to the guidance of federal case law which offers a two-prong test to determine whether certain commercial or financial information is “privileged and confidential.” It is confidential if its disclosure will likely (a) impair the government’s ability to obtain necessary information in the future or (b) cause substantial harm to the competitive position of the person from whom the information was obtained. (Section 44-04-18.2, N.D.C.C., has been repealed. See amended N.D.C.C. § 44-04-18.4).

[N.D.A.G. 94-F-25](#)

August 5, 1994

FEEES FOR ACCESS AND COPIES

When determining a reasonable fee to be charged for a copy of public records pursuant to N.D.C.C. § 44-04-18(2), a public agency may consider the costs of the copying equipment and materials and other costs actually and necessarily incurred in making the copies as well as the labor expenses, excluding the labor expenses incurred in locating and reviewing the records. (BUT SEE amended N.D.C.C. § 44-04-18(2) (copy charge of 25¢)).

[N.D.A.G. 94-L-267](#)

October 7 1994

HUMAN SERVICES

If an investigation under N.D.C.C. § 25-03.1-08 concerns a person who is or has been an alcohol or drug abuse patient, the mental health professional may not obtain information from the patient’s treatment records without a release or a specialized court order.

[N.D.A.G. 94-L-278](#)

October 17 1994

SCHOOLS

Providing information for purposes of a child abuse investigation under N.D.C.C. ch. 50-25.1 is not a violation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g), because interviews of a child at school and assistance in the investigation do not constitute a release of educational records.

[N.D.A.G. 94-L-305](#)

November 3 1994
to Gordy Smith

AUDITOR, STATE

Records declared confidential by N.D.C.C. § 25-01.3-10 regarding protection and advocacy are, nonetheless, available

under N.D.C.C. § 54-10-22.1 to the State Auditor and the Auditor's employees for audit purposes.

[N.D.A.G. 94-L-309](#)
November 9 1994

PUBLIC EMPLOYEES

The Public Employees Retirement System (PERS) Board wanted to modify its policy to more readily accommodate the needs of participating members by providing confidential information to them over the telephone if they have identified themselves by name and authenticated who they are by correctly answering three of the following five personal items: social security number, beginning participation date in the retirement system, birthrate, latest month's salary, and spouse's birthrate. The PERS Board is authorized to adopt the proposed policy as a reasonable implementation of N.D.C.C. § 54-52-26.

[N.D.A.G. 94-L-311](#)
November 10 1994

LAW ENFORCEMENT

A county social service board is required to pay a \$20 fee for a criminal history record check by the Bureau of Criminal Investigation (BCI) because it is a noncriminal justice agency. N.D.C.C. § 12-60-16.9. Only BCI may disseminate criminal history record information to a noncriminal justice agency. N.D.C.C. § 12-60-16.6. The office of county state's attorney is not authorized to disseminate criminal history record information to the county social service board.

[N.D.A.G. 95-L-1](#)
January 17 1995

AUDITOR, STATE

Neither the North Dakota Rules of Evidence nor the North Dakota Rules of Professional Conduct are relevant to the release by the Protection and Advocacy Project (P&A) of its attorney's billings. P&A must provide to the state auditor the unaltered, original billings P&A received from its attorney.

[N.D.A.G. 95-L-4](#)
January 17 1995

HUMAN SERVICES

A parent, guardian, custodian, health care provider, or counselor would be a person with a definite interest in the well-being of a child, as well as a person who would be in a position to serve the child's interests. While the press and others may have a general interest in the well-being of a child or children, that interest is not necessarily a definite interest established beyond doubt or question, or a clearly-defined interest. Because the information and records pertaining to an investigation and inspection of the conditions of a facility and the qualifications of providers do not specifically relate to "children receiving early childhood services," they are not made confidential under N.D.C.C. § 50-11.1-07(3).

[N.D.A.G. 95-L-74](#)

March 21 1995

LAW ENFORCEMENT

Only the Bureau of Criminal Investigation may disclose criminal history record information to parties not described in N.D.C.C. § 12-60-16.5, including a person who is the subject of the records. N.D.C.C. § 12-60-16.6.

[N.D.A.G. 95-L-88](#)

April 3 1995

COUNTIES

The records of the medical county coroner are public records subject to inspection under N.D.C.C. §§ 44-04-18(1) and 11-19.1-08, notwithstanding the provisions of N.D.C.C. § 23-02.1-27 restricting access to vital records information concerning the cause of death of an individual. Under certain circumstances, however, exceptions may apply to the records of the medical county coroner.

[N.D.A.G. 95-L-146](#)

June 21 1995

WORKERS COMPENSATION BUREAU

The list of employers implementing and maintaining a risk management program approved by the Workers Compensation Bureau under N.D.C.C. § 65-04-19.1 is based on information provided in an "employer's report." Therefore, the list is confidential and may not be disclosed to the public.

[N.D.A.G. 95-L-148](#)

June 21 1995

COURTS

It is within the discretion of the particular court to determine the extent of accessibility of judicial records to the public. If any of the specific information made confidential under N.D.C.C. § 14-07.1-18 is contained in a petition for a disorderly conduct restraining order filed with the court, the court is not prohibited from disclosing this information to the public pursuant to its discretion.

[N.D.A.G. 95-L-174](#)

July 24 1995

CITIES

Client files held by an attorney belong to the client rather than the attorney. Because the legal files of a municipality belong to the municipality as the client rather than the city attorney, and because these files also pertain to the office of city attorney as described in N.D.C.C. § 40-20-01, these files must be delivered to the current city attorney under N.D.C.C. § 40-13-10 within five days after notification and request.

[N.D.A.G. 95-L-181](#)

July 31 1995

LAW ENFORCEMENT

SCHOOLS

Section 27-20-52, N.D.C.C., does not apply to school records, but rather to records held by law enforcement. This section strictly limits who may inspect law enforcement records on a child. Neither a school district nor school employees are

among those who may inspect the records absent a court order.

[N.D.A.G. 95-L-243](#)
October 23 1995

AGRICULTURE

The legal and tax assistance program records of the Credit Review Board and the Agriculture Commissioner are open records and not subject to the confidentiality requirements for mediation records under N.D.C.C. § 6-09.10-10.

[N.D.A.G. 95-L-253](#)
November 8 1995

TRADE SECRETS

The basic public policy in favor of disclosure of government-held information and the statutory penalty attendant thereto, must be balanced against the broad definition of confidential information applicable to the NDDF, and the greater statutory penalty for the unauthorized disclosure of such information. While the determination of which information is confidential and which information may be disclosed will need to be made on a case-by-case basis.

[N.D.A.G. 96-L-16](#)
February 8 1996

WORKERS COMPENSATION BUREAU

A requester is entitled to receive a copy of the Bureau's certificate of premium payment including the employer's rate classifications, but the information contained in an employer's report or derived therefrom is not available except as tabulated and published by the Bureau in statistical form. See N.D.C.C. § 65-04-15. Also, whether any premium adjustments have been made is a matter of public record.

[N.D.A.G. 96-L-119](#)
June 5 1996

LAW ENFORCEMENT

TRANSPORTATION, DEPARTMENT OF

A local law enforcement agency or an investigating officer may not release a copy of the report required to be filed with the director of the Department of Transportation under N.D.C.C. § 39-08-13, regardless of whether the record is open or contains confidential information. (Superseded by N.D.A.G. 96-L-232 (December 3 to J. Thomas Traynor).)

[N.D.A.G. 96-F-18](#)
September 13 1996

NONGOVERNMENTAL ORGANIZATIONS

The International Peace Garden, Inc. is both expending public funds directly appropriated by the State Legislature and supported in whole or in part by public funds, and is therefore subject to the open meetings and records laws. A report on a personnel matter prepared at the direction of the board of directors of the corporation, whether in the possession of the corporation or the private investigator who prepared the report, is a record of the corporation for purposes of the open records

law. A meeting of the board of directors of the corporation to discuss the record, or any other matter, must be open to the public unless another exception to the open records or meetings laws applies.

[N.D.A.G. 96-L-200](#)
November 7 2000

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

Confidential information communicated to a person entitled to receive the information through a relay operator under a telecommunications device for the deaf (TDD) system does not violate state confidentiality laws. No breach of confidentiality occurs because the operator is required to preserve the confidentiality of the communication.

[N.D.A.G. 96-L-232](#)
December 3 1996

FEEES FOR ACCESS AND COPIES LAW ENFORCEMENT TRANSPORTATION, DEPARTMENT OF

An accident report required to be filed under N.D.C.C. § 39-08-13, except for any confidential portion containing an investigating officer's opinion regarding fault or responsibility for the accident, is an open record in the hands of local law enforcement agencies and must be disclosed upon request. Although the Department of Transportation is authorized, by N.D.C.C. § 39-08-13(6), to charge a \$2 fee for providing a copy of the portion of the report that is not confidential, local law enforcement agencies are authorized to charge only a reasonable fee as authorized by N.D.C.C. § 44-04-18. (Superseding N.D.A.G. 96-L-119 (June 5 to J. Thomas Traynor).)

[N.D.A.G. 97-L-13](#)
January 29 1997

PERSONAL INFORMATION TRANSPORTATION, DEPARTMENT OF

The state does not have to provide notice of the procedure for individuals to contact the Department of Transportation to request that personal information not be disclosed prior to the next renewal of the person's automobile title, registration permit, license, or identification card. Because no notice is required until such renewal, and a person has no current right to have personal information withheld from public disclosure, the Department of Transportation could not be found legally liable for failing to provide notice of the procedure for requesting that personal information be closed to the public.

[N.D.A.G. 97-F-06](#)
September 10 1997

PUBLIC EMPLOYEES RECORD, DEFINED Each item of recorded information possessed or kept by PERS

regarding public business, including each entry of information on forms submitted to PERS, is open unless "otherwise specifically provided by law." There are numerous alternative definitions for the plain meaning of "record." Sections 54-52-26, 54-52.1-11, and 54-52.3-05, N.D.C.C., make confidential any recorded information submitted on the forms having a logical or natural association with: a member's or beneficiary's retirement benefits, including the person's identity and other personal identifying information; medical claims by a member and amounts of life insurance coverage, which does not include the application for participation in the PERS health care plan; and an employee's medical or dependent care reimbursement under the pre-tax benefits program.

[N.D.A.G. 97-O-1](#)
November 10 1997

DENIAL OF RECORDS
LAW ENFORCEMENT
UNREASONABLE DELAY

Unwritten information about a motor vehicle accident which is known to the county sheriff and state's attorney is not a "record" for purposes of the open records law. An explanation of the legal basis for denying records is sufficient without citing the number of the specific statute authorizing the denial. Access to public records outside regular office hours is not required. However, under the facts, immediate disclosure of the sheriff's field notes regarding an accident was required and any delay in providing access or copies was unreasonable.

[N.D.A.G. 98-F-02](#)
January 8 1998

LAW ENFORCEMENT

State statutes which make juvenile court files and law enforcement records of a juvenile confidential do not prevent a state professional licensing board from asking an applicant about his or her juvenile record. However, because the board will not have access to those records, it will be unable to confirm the truthfulness of the applicant's response.

[N.D.A.G. 98-O-03](#)
February 20 1998

DENIAL OF RECORDS
FEES FOR ACCESS AND COPIES
OPEN RECORDS, IN GENERAL
PRELIMINARY DRAFTS AND WORKING PAPERS
TRADE SECRETS
UNREASONABLE DELAY

Completed forms in the possession of a job development authority are not "working papers." Economic development records are not exempt under N.D.C.C. § 44-04-18.4 if they have previously been publicly disclosed or if they do not contain any protectible information (trade secrets, commercial

or proprietary information) regarding the business. A verbal request for records over the telephone has the same effect as a written request and must be fulfilled or denied within a reasonable time. Factors to be considered include the need for removing closed or confidential material, the need to obtain legal advice regarding the openness of the requested records, the quantity of records requested, and whether staff are employed by the public entity on a full or part-time basis. A denial must clearly address all the requested records which are not disclosed and the legal authority supporting the denial.

N.D.A.G. 98-L-17

March 2 1998

TRADE SECRETS

The terms "commercial" and "financial" as used in N.D.C.C. § 44-04-18.4 refer broadly to information pertaining to commerce (the buying or selling of goods or services) or finances (monetary resources). Protectible information is "of a privileged nature" under N.D.C.C. § 44-04-18.4 if disclosure is likely to impair the public entity's future ability to obtain necessary information or if disclosure would likely cause substantial competitive injury to the person or entity from whom the information was obtained. In making this decision, it is appropriate for an agency to contact the person or entity which provided the information. The disclosure of contract prices is a part of doing business with the government and, as a matter of law, does not cause a competitive injury to the contractor.

N.D.A.G. 98-O-04

March 3 1998

DENIAL OF RECORDS

FEES FOR ACCESS AND COPIES

MINUTES

PRELIMINARY DRAFTS AND WORKING PAPERS

PUBLIC ENTITY

UNREASONABLE DELAY

A joint enterprise of several counties to carry out public business on the counties' behalf, such as the Southwest Multi-County Correction Center, is an agency of those counties and therefore falls under the definition of "public entity." A public entity is not required under this section to disclose records which do not exist, or to create a new record by compiling information from other records. However, even if the reason for a denial is that the requested records do not exist, the denial still must be made in writing if requested. Once a "working paper" or "preliminary draft" is no longer being worked on or is distributed to members of a governing body, the record must be disclosed upon request. Notes of meetings are no longer working papers once draft minutes of the meeting are prepared, even if the minutes have not yet been

approved by the governing body. Draft minutes usually must be prepared and made available before the next regular meeting of the governing body. The disclosure of draft minutes cannot be delayed until the minutes are approved by the governing body.

[N.D.A.G. 98-L-32](#)

March 30 1998

HUMAN SERVICES

LAW ENFORCEMENT

The term "law" as defined in N.D.C.C. § 44-04-17.1(7) includes federal regulations which prohibit further disclosure of criminal history record information received from the Federal Bureau of Investigation. Accordingly, the Department of Human Services is not required to disclose FBI criminal history record information in its possession under the open records law.

[N.D.A.G. 98-F-09](#)

April 9 1998

LAW ENFORCEMENT

The information obtained by a criminal justice agency under a search warrant is "criminal investigative information" under N.D.C.C. § 44-04-18.7. If such information is "active," disclosure is not required and is left to the discretion of the public entity possessing the records unless disclosure is prohibited by another statute which makes the records confidential rather than exempt. Once criminal investigative information is no longer active, the information is an open record unless another exception applies.

[N.D.A.G. 98-O-07](#)

April 24 1998

OPEN RECORDS, IN GENERAL

A public entity complies with N.D.C.C. § 44-04-18 when it mails records to a requester, even if the records are lost in the mail. The open records law is violated when records are destroyed or thrown away while a request for those records is still pending. Throwing the records away while a request is pending is also a denial of the request which must be explained and made in writing if requested.

[N.D.A.G. 98-L-51](#)

April 24 1998

SCHOOLS

The Family Educational Rights and Privacy Act (FERPA), 12 U.S.C. § 1232g, is a "law" prohibiting the disclosure of certain education records under the open records law. Teacher journals which are prepared to record events in the special education of a student are not prepared simply to aid the personal memories of the teachers and are therefore "education records" which must be available to the parents of the student.

[N.D.A.G. 98-F-11](#)

PERSONAL INFORMATION

April 30 1998

PUBLIC EMPLOYEE RECORD, DEFINED

Resumes and other personal information submitted by a person applying for a position or office with a public entity fall under the definition of "record" in N.D.C.C. § 44-04-17.1(15) and therefore are open records. There is no general exception to the open records law for resumes or other personal information submitted by an applicant for employment with a public entity. Certain personal information is closed under N.D.C.C. § 44-04-18.1(2), but only for certain information provided by a public employee in the context of the person's employment.

[N.D.A.G. 98-O-10](#)

May 7 1998

DENIAL OF RECORDS

A denial of a request for records must be made in writing, if requested, even if the reason for not disclosing the records is that the records do not exist.

[N.D.A.G. 98-F-13](#)

May 12 1998

OPEN RECORDS, IN GENERAL TRANSPORTATION, DEPARTMENT OF

Certain highway safety records are not subject to disclosure under federal law and are therefore not subject to the open records law. Normally, the identity of a requester and purpose of the request are irrelevant; the right to access to public records applies to all persons equally. However, when an exception to the open records law is based on the identity and purpose of the person making the request, it is appropriate for the public entity to determine that the person's identity or purpose do not make them subject to the exception before the entity is required to disclose the requested records. A request by a litigant in a case involving a public entity, or by an agent of a litigant, for records of a public entity must be submitted to the attorney representing the public entity and is subject to the rules of discovery.

[N.D.A.G. 98-O-11](#)

June 8 1998

MINUTES

Draft minutes of an open meeting are open records, even if the minutes have not been approved by the governing body, and must be available for access and copying upon request.

[N.D.A.G. 98-L-73](#)

June 8 1998

OPEN RECORDS, IN GENERAL RECORD, DEFINED

Confidential records received by the Information Services Division (ISD) from another state agency to fulfill the purposes of N.D.C.C. ch. 54-44.2 continue to be closed or confidential in ISD's possession. Mere possession of records, rather than

ownership, is all that is necessary for a public entity to be required to disclose the record under this section. When two public entities possess the same record, each entity usually possesses the record in its own capacity and has an independent duty to determine whether the information is an open record. However, when a state agency holds records on behalf of another agency as its agent, and not in its own capacity, the agency possessing the records is required to respond on behalf of the entity providing the records and may not refer the requester to the providing entity. (BUT SEE N.D.C.C. § 54-59-16 (requests may be referred to the agency providing the records).)

[N.D.A.G. 98-F-19](#)

June 10 1998

NONGOVERNMENTAL ORGANIZATIONS

An organization receiving public funds under a contract with a state agency is not supported by public funds under N.D.C.C. § 44-04-17.1, even if the contract is entitled "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives, including a commercially reasonable amount of profit for the contractor.

[N.D.A.G. 98-L-77](#)

June 17 1998

AGRICULTURE

TRADE SECRETS

Field inspection applications and reports by the State Seed Department are records. These seed field records are commercial information under N.D.C.C. § 44-04-18.4. The information in these records regarding the parentage of seeds has a privileged nature under N.D.C.C. § 44-04-18.4 because disclosure of the information would allow a competitor to duplicate and sell the same product in competition with the person providing the information, causing substantial competitive harm to that person.

[N.D.A.G. 98-F-22](#)

June 23 1998

WORKERS COMPENSATION BUREAU

The portion of an administrative hearing by the Workers' Compensation Bureau during which closed or confidential records are introduced or testimony is taken regarding those records must be closed to the public unless the worker consents to an open hearing. The remainder of the administrative hearing must be open.

[N.D.A.G. 98-O-15](#)

July 2 1998

MINUTES

For purposes of an opinion issued under N.D.C.C. § 44-04-21.1, whether minutes have been requested

is a question of fact. Based on the public entity's statement, this office will assume, without weighing the credibility of the requester against the public entity, that the minutes were never requested.

[N.D.A.G. 98-O-19](#)

August 12 1998

UNREASONABLE DELAY

A delay by a public entity of more than two weeks before granting a request for minutes of a meeting of a water resource district board was an unreasonable delay.

[N.D.A.G. 98-L-128](#)

September 2 1998

PUBLIC BUSINESS
RECORD, DEFINED

An item of recorded information is not a record if it has not been received or prepared for use in connection with public business. Mere possession of recorded information by a public entity is not sufficient. Rather, the term "connection" requires a link or association between the recorded information and the public entity's public business.

[N.D.A.G. 98-O-20](#)

September 15 1998

OPEN RECORDS, IN GENERAL
UNREASONABLE DELAY

Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the public entity must either provide the records or explain why the request is not being satisfied. In either case, a response must be provided within a reasonable time. A delay of almost a month and a half before denying a request was unreasonable. A public entity is not required to provide more than one copy of an open record. However, before denying a request for an additional copy, the public entity is responsible for making sure that the requested record is the same as the record previously provided by the public entity. The city was not required to compile information from other city records at the request of a member of the public.

[N.D.A.G. 98-O-22](#)

October 16 1998

COMPUTER RECORDS
FEES FOR ACCESS AND COPIES
TRADE SECRETS
UNREASONABLE DELAY

A public entity cannot deny a request for a record on the basis that the record does not exist if the record was created or received while the request was pending. The definition of trade secret includes any compilation prepared by a public entity which the public entity attempts to keep secret and from which the public entity may derive economic value if the information is not publicly disclosed. Disclosure of a park district's membership list cannot cause competitive injury as a

matter of law unless the district is in competition with another entity which offers similar accommodations or services. A public entity may not deny a request for an open record because the record also contains closed or confidential information, no matter whether the record is a paper document or a computer file. The bank account number and credit card number of persons purchasing memberships from a city park district are exempt from the open records law under N.D.C.C. § 44-04-18.9.

[N.D.A.G. 98-F-28](#)
November 23 1998

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

The authority to disclose closed or confidential records under N.D.C.C. § 44-04-18.10 is subject to federal restrictions on such disclosures. Since N.D.C.C. § 25-03.1-43 limits how certain records may be shared with other state agencies, it prevails over the general disclosure authority in N.D.C.C. § 44-04-18.10.

[N.D.A.G. 98-L-194](#)
November 23 1998

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS

Names, addresses, and telephone numbers provided to a 911 answering point by a telecommunications company are confidential under state law. However, the information may be shared for law enforcement and debt collection purposes under N.D.C.C. § 44-04-18.10, child support purposes under N.D.C.C. §§ 50-09-08(4) or 50-09-08.2(1), pursuant to a court order, or for the purpose of responding to a call for emergency help.

[N.D.A.G. 98-O-24](#)
November 23 1998

NONGOVERNMENTAL ORGANIZATIONS PUBLIC BUSINESS

An organization is supported by public funds if it receives unrestricted funds for its general support, but not if the funds received by the organization were paid in exchange for goods or services having an equivalent fair market value. The definition of public funds includes cash and other assets or property which have a significant economic value, including the free use of public property. When an organization has received public funds for its general support, all of its financial records pertain to public business and are open because the organization's use of public funds can be fully determined only if those transactions are placed in context with the organization's overall finances. As a result, the budget of an organization supported by public funds, such as the Fargo

Youth Commission, is an open record because it relates to the use and impact of the public funds received by the organization, notwithstanding the fact that the information may be speculative and outdated.

[N.D.A.G. 98-O-25](#)
November 24 1998

EXECUTIVE SESSION,
RECORDINGS AND MINUTES
MINUTES

Unless a statute provides otherwise, the minutes of executive sessions are treated the same as recordings of those sessions and continue to be closed even if disclosure would no longer defeat the purpose of the executive session. The Office of Attorney General cannot review an alleged deficiency in the minutes of a meeting until after the minutes have been approved by the governing body, because the deficiencies may still be cured by the body prior to adopting the minutes. The requirements in N.D.C.C. § 44-04-19.2(2) for closing a meeting should not be applied so rigidly that a script needs to be prepared ahead of time in order to comply with those requirements.

[N.D.A.G. 99-L-30](#)
April 5 1999

DISCLOSURE OF CLOSED
OR CONFIDENTIAL RECORDS

The confidentiality requirements in N.D.C.C. § 57-40.6-07 apply only to information provided to a 911 answering point by a telecommunications company. The application of a statute making certain records confidential may be waived by the party or parties for whose benefit the statute was enacted.

[N.D.A.G. 99-O-02](#)
April 5 1999

NONGOVERNMENTAL ORGANIZATIONS
OPEN RECORDS, IN GENERAL
PUBLIC ENTITY

The North Dakota Insurance Reserve Fund is a public entity because it is a joint enterprise of several political subdivisions that have united to self-insure against their legal liability and it is expending public funds. Any settlement agreement by the North Dakota Insurance Reserve Fund or its attorneys, as agents of the public entities who participate in the fund, is an open record. Any confidentiality agreement by the North Dakota Insurance Reserve Fund or its attorneys, as agents of the public entities who participate in the fund, is against public policy and is void.

[N.D.A.G. 99-O-03](#)
April 7 1999

NONGOVERNMENTAL ORGANIZATIONS

The definition of public funds does not include funds provided from the federal government directly to a non-governmental

organization. The Coalition Against Domestic Violence is a public entity because it has received unrestricted state funds for its general support and those unrestricted funds were pooled with other income. Therefore, to fully determine the Coalition's use of the public funds it has received, all of its financial records are open to the public, including the minutes of any meeting at which the organization's finances were discussed.

[N.D.A.G. 99-O-07](#)

June 29 1999

EXECUTIVE SESSION,
RECORDING AND MINUTES

A state licensing board does not violate the open records law when it denies a request for a copy of the recording of an executive session.

[N.D.A.G. 99-L-57](#)

July 6 1999

HUMAN SERVICES
PERSONAL INFORMATION

The Department of Human Services is not an "occupational or professional board, association, or commission" as those terms are used N.D.C.C. § 44-04-18.1, so personal information regarding individuals who are licensed by the department is not exempt from the open records law under that section.

[N.D.A.G. 99-L-71](#)

August 6 1999

COURTS
LAW ENFORCEMENT

Chapter 12-60, N.D.C.C., applies to criminal justice agencies and does not apply to records maintained by the courts. A clerk of district court is an adjunct of the district court and, when acting in that capacity, is not a "criminal justice agency" for purposes of N.D.C.C. ch. 12-60. Although "criminal history record information," as a compilation of information, may only be obtained from the Bureau of Criminal Investigation, source documents for each conviction may be available from the clerks of court and from local law enforcement agencies.

[N.D.A.G. 99-L-115](#)

November 18 1999

DISCLOSURE OF CLOSED OR
CONFIDENTIAL RECORDS
EXECUTIVE SESSION, RECORDING AND MINUTES

Each member of a governing body of a public entity has an inherent right to attend all meetings of that body, including executive sessions, unless the subject of the executive session is litigation involving that member. The same is true for access to closed or confidential records of the public entity. A member who was absent from an executive session is entitled to listen to the recording of the session, even though the recording is not open to the public. Allowing an absent member to listen to

the recording does not make the recording an open record.

[N.D.A.G. 99-L-126](#)

December 9 1999

LAW ENFORCEMENT

Chapter 27-20, N.D.C.C., does not prohibit the sharing of information about juvenile offenders between attorneys within the same state's attorney's office, although the subsequent use of that information will be governed by N.D.C.C. ch. 27-20, the North Dakota Rules of Evidence, and the fair treatment standards for victims and witnesses in N.D.C.C. ch. 12.1-34.

2000

[N.D.A.G. 2000-L-4](#)

January 18 2000

LAW ENFORCEMENT

Section 27-20-52, N.D.C.C., does not apply to all law enforcement records regarding children. Rather, to be confidential under this section, the record must pertain to a child who was alleged or found to be delinquent, unruly, or deprived. Thus, records regarding the death of a minor who died while in the custody of a public corrections facility are not confidential under N.D.C.C. § 27-20-52, except possibly for the records which identify the reason why the child was an inmate at the facility.

[N.D.A.G. 2000-L-18](#)

February 14 2000

INMATE RECORDS

As a general rule, all records of the Department of Corrections and Rehabilitation, including records of an inmate's protective custody placement, are confidential and may not be disclosed except in the manner provided in N.D.C.C. § 12-47-36. (See also N.D.A.G. 2000-L-48 (April 4 2000 to Warren Emmer).)

[N.D.A.G. 2000-F-09](#)

February 28 2000

COURTS

INMATE RECORDS

LAW ENFORCEMENT

OPEN RECORDS IN GENERAL

The phrase "law enforcement" as used in N.D.C.C. § 27-20-52 refers to officers and agencies involved in the detection, investigation, and prosecution of crimes, not correctional facilities. The phrase "juvenile court" in N.D.C.C. § 27-20-51 is limited to district courts in North Dakota and does not include courts in other jurisdictions. Law enforcement records regarding a juvenile continue to be confidential under N.D.C.C. ch. 27-20 after the juvenile has died. N.D.C.C. § 27-20-51 does not prohibit further disclosure of confidential juvenile court records which are shared with a public institution which has custody of the juvenile. Unless another open records exception

applies to records in the possession of the institution, such as for the Department of Corrections and Rehabilitation, the juvenile court records shared with the institution become open records. Public entities do not have the authority to create open records exceptions by contract.

[N.D.A.G. 2000-O-04](#)

March 15 2000

SCHOOLS

Normally, the location of a record is not relevant to whether it is open to the public. However, including a non-academic record of a student in the student's permanent file makes the record an "education record" under the Family Education Rights and Privacy Act (FERPA).

[N.D.A.G. 2000-L-48](#)

April 4 2000

DISCLOSURE OF CLOSED
OR CONFIDENTIAL RECORDS
INMATE RECORDS

Notwithstanding the general rule of confidentiality in N.D.C.C. § 12-59-04 for records of the Department of Corrections and Rehabilitation, disclosure of certain records will be authorized or required under other specific statutes. Examples include notification of victims and witnesses; offender registration, reporting of criminal history record information and other notification to law enforcement agencies; DNA testing; and other disclosures permitted under N.D.C.C. § 12-47-36.

[N.D.A.G. 2000-O-06](#)

May 5 2000

SCHOOLS

A letter to a school board from a school bus driver which was based on the driver's personal observations as a parent of students attending the school is not an education record which is confidential under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b).

[N.D.A.G. 2000-L-94](#)

May 26 2000

FEEES FOR ACCESS AND COPIES

The fee of two dollars per page in N.D.C.C. § 11-15-07(4) is an exception to the "reasonable fee" provided in N.D.C.C. § 44-04-18(2), although the increased fee only applies to "papers" and not to other types of records.

[N.D.A.G. 2000-L-99](#)

June 13 2000

LAW ENFORCEMENT

A distinction exists under N.D.C.C. ch. 12-60 between a compilation of a person's criminal history and the source documents from which a person's criminal history is compiled. Section 12-60-16.6, N.D.C.C., specifies the Bureau of Criminal Investigation (BCI) as the only agency which may disseminate compiled criminal history information to parties other than those listed in N.D.C.C. § 12-60-16.5. This provision does not

apply to requests for source documents in the possession of a local criminal justice agency pertaining to a person's arrest or conviction of a particular criminal offense, although other statutes may prohibit disclosure of the records or authorize restrictions on the release of such records. A release signed by the subject of the source documents is not necessary for disclosure of those records to be required, nor will such a release allow a person to obtain a copy of a criminal history record without making the request to BCI and paying the appropriate fee.

[N.D.A.G. 2000-O-07](#)

June 26 2000

TRADE SECRETS

The exemptions for economic development records in N.D.C.C. § 44-04-18.4(5) authorize a public entity to conceal the identity, nature, and prospective location of a business or industry, but only until the business or industry discloses that information to the public. This authority no longer applies once a business or industry has already located, relocated, or expanded within the state. The second part of the exemption for economic development records applies to trade secrets and commercial and financial information that is received from a business, even if the business' identity has been previously disclosed. However, this exception does not apply to the identity of the business or to information generated by the public entity itself. The confidentiality provisions in N.D.C.C. ch. 6-08.1 and § 6-09-35 for customers of the Bank of North Dakota do not apply to records of recipients of PACE (partnership in assisting community expansion) loans which are in the possession of a different public entity, such as the Stark Development Corporation.

[N.D.A.G. 2000-L-107](#)

June 28 2000

TRADE SECRETS

The exemption in N.D.C.C. § 44-04-18.4(1) for financial information of a privileged nature applies not only to financial information of a business, but also to personal financial information such as a detailed breakdown of a person's income and medical expenses. Disclosure of financial information of an applicant for a tax credit, who is not in competition with other applicants, cannot cause a competitive injury to the applicant. Thus, whether the information is "of a privileged nature" depends on whether disclosure would impair the public entity's future ability to obtain such information from other applicants. Disclosure of the detailed, personal information in the application form on senior citizens and disabled persons would impair, as a matter of law, the county's future ability to obtain such information.

[N.D.A.G. 2000-O-11](#)
September 1 2000

FEES FOR ACCESS AND COPIES

Subsection 8 of N.D.C.C. § 44-04-18 authorizes two separate fees. The first fee is for making copies of a requested record and is limited to the actual cost to the public entity of making the copies. The second fee is for locating requested records when it takes the public entity longer than one hour to find the records that have been requested. The fee charged by a school district was not authorized by law because the fee was for the time needed to prepare and compile a new record that had not been requested by the member of the public rather than providing copies of existing records.

[N.D.A.G. 2000-O-13](#)
December 14 2000

DENIAL OF RECORDS

INMATE RECORDS

MEDICAL RECORDS

A public entity failed to adequately explain the legal basis for its denial of a request for records when it indicated the denial was based on a conversation with the Attorney General's office, the entity's health care administrator, and the entity's attorney. Medical records of a deceased juvenile inmate at a county jail or multi-county correctional center are not protected by an implied right to privacy and are, as a general rule, open to the public upon request. BUT SEE N.D.C.C. § 12-44.1-28 (enacted in 2001).

[N.D.A.G. 2000-L-179](#)
December 29 2000

FEES FOR ACCESS AND COPIES

If a state's attorney possesses records indicating whether a service charge has been paid to the district court, the state's attorney is required to respond to a request for those records, but may charge a copying fee as well as a search fee for locating the requested records if locating the records takes longer than one hour.

2001

[N.D.A.G. 2001-O-02](#)
April 5 2001

PRELIMINARY DRAFTS AND WORKING PAPERS

UNREASONABLE DELAY

Providing access to records which are open to the public is a ministerial act which will not require action of a governing body in most cases. A public entity's response to an open records request cannot be automatically extended until the next scheduled meeting of the governing body simply to enable the governing body to give its permission to release the records. A delay to obtain legal advice on whether the release requested records is authorized only if there is a legitimate legal and

factual question on what information must be disclosed, and is limited to the length of time which is reasonably necessary to obtain that advice. Further delay after the attorney is prepared to advise the governing body is not authorized, even if it is necessary for the governing body to hold a special meeting to receive that advice.

[N.D.A.G. 2001-O-04](#)
May 16 2001

NONGOVERNMENTAL ORGANIZATIONS
PRELIMINARY DRAFTS AND WORKING PAPERS
PUBLIC ENTITY
UNREASONABLE DELAY

A delay of seven days in responding to a request for records was unreasonable because the city did not need to obtain legal advice prior to indicating that the requested records did not exist. An advertising firm hired to perform an educational campaign on the city's behalf was an "agent" of the city for purposes of N.D.C.C. § 44-04-18. Documents created by the city's advertising company in the course of conducting the advertising campaign may be withheld only while the documents are being used to create a final record. The city was not authorized to continue withholding the records until completion of the advertising campaign.

[N.D.A.G. 2001-O-06](#)
June 18 2001

OPEN RECORDS, IN GENERAL

The plain meaning of the word "copy" in N.D.C.C. § 44-04-18(2) means a duplicate or exact reproduction of the original record. A black and white photocopy of three color pictures was not a "copy" of those photographs as required under N.D.C.C. § 44-04-18(2).

[N.D.A.G. 2001-O-10](#)
September 7 2001

NONGOVERNMENTAL
ORGANIZATION
PUBLIC ENTITY

There are four ways the open records and meetings laws may apply to a "nongovernmental" organization. A local economic development organization was supported by public funds because the city's payments were to fund the operations of the organization rather than to purchase services at fair market value. Because the funds were provided for the organization's general support, all meetings and records of the organization pertained to public business and are required to be open unless otherwise specifically provided by law. Nothing limits the "agency of government" test to personnel firms working for a public entity. The question is whether the provider is acting in place of a public entity, or merely providing services to the entity.

[N.D.A.G. 2001-O-11](#)
September 13 2001

NONGOVERNMENTAL ORGANIZATIONS
PUBLIC BUSINESS
PUBLIC ENTITY
TRADE SECRETS

The total amount of public funds provided to the corporation, coupled with the indistinct terms of the contract dealing with the purposes for which the funds are to be expended, lead to the conclusion that the local economic development corporation is supported by public funds. Public funds are being used to support the organization rather than purchase services. Because the public funds received by the corporation are pooled with other funds of the corporation, all recorded information regarding the corporation's finances or performance of governmental functions is open to the public unless otherwise specifically provided by law. An audit report involving the corporation and the performance of its chief executive is open to the public. The report was not a personnel record and could not be withheld under N.D.C.C. § 44-04-18.1(3).

[N.D.A.G. 2001-O-12](#)
September 26 2001

OPEN RECORDS, IN GENERAL
UNREASONABLE DELAY

A delay of over a month in providing copies of requested records was not unreasonable when the requester indicated he would pick up the copies and had not yet done so. A request for a large number of records is not, by definition, overbroad. The request for records in this case reasonably identified the records being requested. The number of records being requested affected the time within which the public entity was required to respond to the request, but not whether the request was sufficient under N.D.C.C. § 44-04-18.

[N.D.A.G. 2001-F-10](#)
December 11 2001

OPEN RECORDS, IN GENERAL

The name of an agricultural or commercial borrower of the Bank of North Dakota and the amount of financing provided to the borrower are open to the public upon request to the Industrial Commission under N.D.C.C. §§ 6-08.1-02(7) and 44-04-18, but only after the loan has closed. If the Industrial Commission writes off a loan, there is no authority for public disclosure of that information. All other information of customers of the Bank of North Dakota is confidential and may only be released as allowed or required by law, including the exceptions located in N.D.C.C. § 6-09-35 and N.D.C.C. ch. 6-08.1, or if disclosure is inherent in the business of financial institutions.

2002

[N.D.A.G. 2002-O-01](#)

January 10 2002

ATTORNEY WORK PRODUCT

To effectively conceal a public entity's attorney work product or attorney consultations from its adversary in a pending or reasonably predictable lawsuit or administrative proceeding, that information must be concealed from the public as well. A public entity essentially waives its right to invoke the exceptions to the open records and meetings laws in N.D.C.C. § 44-04-19.1 if the public entity allows its adversary to review the work product or attend the consultation.

[N.D.A.G. 2002-L-06](#)

January 29 2002

DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS MEDICAL RECORDS

Generally, public entities possessing the same record must independently determine whether an exception applies to a record in the entity's possession. Even if release of a confidential record to another public entity is authorized, the receiving entity must have an applicable open records exception or else the record is open to the public in the entity's possession. Information in vital records regarding out-of-wedlock births and indicating causes of death are confidential, but may be released for statistical purposes.

[N.D.A.G. 2002-O-03](#)

February 11 2002

UNREASONABLE DELAY

Failure to provide copies of requested records, deny the request, or require payment of the fee for copying the requested records until more than two months after receiving the request was an unreasonable delay.

[N.D.A.G. 2002-O-04](#)

February 25 2002

FEES FOR ACCESS AND COPIES

Unless it takes a public entity longer than one hour to find the requested records, state law effectively maintains free access to public records.

[N.D.A.G. 2002-L-15](#)

February 28 2002

OPEN RECORDS, IN GENERAL PUBLIC ENTITY

A "representative organization" of teachers is not a public entity because it represents the interests of its individual members and does not exercise public authority or perform a governmental function. A school district's copy of a hearing report issued by the Education Factfinding Commission is open to the public from the first day the report is delivered by the Commission to the members of the board of the district, even if

the report has not yet been made public by the Commission.

[N.D.A.G. 2002-L-19](#)

April 1 2002

COURTS
LAW ENFORCEMENT
SCHOOLS

Whether or not the records of a child who is at least 14 years old are protected depends on whether the child is subject to the jurisdiction of the juvenile court. Records of the child's offense under N.D.C.C. §§ 27-20-51 or 27-20-52 are open to the public unless disclosure of court records is restricted by the municipal court or rules of the North Dakota Supreme Court. However, if a child under 14 years old has committed the same offense as an "unruly child" subject to the jurisdiction of the juvenile court, the records of the child's offense are not open to the public under N.D.C.C. §§ 27-20-51 and 27-20-52. If a school district acquires records regarding a child who has committed a non-criminal tobacco-related offense under N.D.C.C. § 12.1-31-03(2), those records become "education records" subject to the Family Educational Rights and Privacy Act (FERPA) and may not be released except as authorized in FERPA or with the consent of the student's parents.

[N.D.A.G. 2002-O-05](#)

April 1 2002

ATTORNEY WORK PRODUCT
OPEN RECORDS, IN GENERAL
SCHOOLS

The exception to the open records law in N.D.C.C. § 44-04-19.1 for "attorney work product" protects the products of an attorney's thought process on legal issues posed by a pending or reasonably predictable court action or adversarial administrative proceeding. The types of records protected under the exception are similar to those that may be protected as "opinion work product" under N.D.R. Civ. P. 26(b)(3). A public entity receiving an open records request from or on behalf of an adversary to a pending court action or adversarial administrative proceeding is entitled under subsection 5 of N.D.C.C. § 44-04-18 to the full scope of the discovery privilege in N.D.R. Civ. P. 26(b)(3) for material prepared in anticipation of a court action or adversarial administrative proceeding. Since the exception in subsection 5 of N.D.C.C. § 44-04-18 is based on the identity of the person making the request, it is appropriate for the public entity to determine that the person is not an adversary or agent of an adversary before disclosing the requested records.

[N.D.A.G. 2002-L-32](#)

June 5 2002

OPEN RECORDS, IN GENERAL

An official or entity responding to an open records request

must follow the law that is in effect at the time the request is made.

[N.D.A.G. 2002-O-06](#)
June 27 2002

FEES FOR ACCESS AND COPIES
UNREASONABLE DELAY

The board's delay in providing copies of the requested records for approximately one and one half months was an unreasonable delay. The board violated state law when it charged more than the actual cost of making copies of the requested records.

[N.D.A.G. 2002-L-39](#)
July 12 2002

COUNTIES
DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS
Under N.D.C.C. § 30.1-11-01, wills may be deposited with the county recorder for safekeeping, and must be kept confidential. The county recorder may disclose the fact that the testator has deposited a will for safekeeping to members of the general public who request the information, but not the contents of the will. Only the testator or a person authorized in writing by the testator may receive the will, and the personal representative named in the will may not receive the will without the specific written authorization before the testator's death.

[N.D.A.G. 2002-L-41](#)
July 12 2002

CITIES
RECORDS, DEFINED
A city's appraisal of real property in connection with a flood protection project is an open record.

[N.D.A.G. 2002-O-08](#)
July 17 2002

TRADE SECRETS
TRANSPORTATION, DEPARTMENT. OF
UNREASONABLE DELAY
A 37-day delay in responding to an open records request was an unreasonable delay. Contractor payroll reports submitted to the State Department of Transportation (DOT) pursuant to federal law are not confidential records under N.D.C.C. § 24-02-11 or confidential commercial or financial information under N.D.C.C. § 44-04-18.4(1) because the release of such records will not cause substantial harm to the contractor's competitive position and disclosure of the information is not likely to impair the DOT's ability to obtain such information in the future.

[N.D.A.G. 2002-O-09](#)
September 17 2002

CITIES
NONGOVERNMENTAL ORGANIZATIONS
PUBLIC ENTITY
TRADE SECRETS

Under N.D.C.C. § 44-04-17.1(12)(c), the Minot Area Chamber of Commerce Task Force is considered a “public entity” because it (1) is supported by public funds from the city of Minot that are not provided in exchange for goods or services having an equivalent fair market value and (2) it acted as an agent of the city to encourage the retention and oppose the closure of the Minot Air Force Base, essentially an economic development function of the city. However, strategies and plans of the task force’s expert consultant relating to base retention activities are protected as trade secrets or commercial information under N.D.C.C. § 44-04-18.4(1). Such information is privileged and, therefore, confidential under N.D.C.C. § 44-04-18.4(1) because release of such information would cause substantial harm to the task force and the city in that it would place them at a competitive disadvantage.

[N.D.A.G. 2002-L-55](#)

October 4 2002

DISCLOSURE OF CLOSED
OR CONFIDENTIAL RECORDS
PUBLIC EMPLOYEES

Section 54-52-26, N.D.C.C., does not prevent an agency head or his designee from viewing retirement benefit records contained in the personnel file of that agency’s employee. Whether a specific employee or official is currently participating in the uniform group insurance program is confidential under N.D.C.C. § 54-52.1-11. All records indicating the amount of public funds paid by an employer on behalf of a specific employee as premiums for that employee’s participation in the uniform group insurance program are confidential.

2003

[N.D.A.G. 2003-O-01](#)

January 30 2003

OPEN RECORDS, IN GENERAL
NONGOVERNMENTAL
ORGANIZATIONS
PUBLIC ENTITY
SCHOOLS
POSSESSION OF RECORDS

A document that a public entity has returned and no longer has in its possession is not a public record. A nongovernmental entity receiving public funds under a guaranteed energy savings contract entered into after going through a request for proposals is presumed to be paid fair market value for the goods and services provided and is therefore not a “public entity” subject to the open records law. A nongovernmental entity providing system improvements to a school district and

implementing energy conservation measures to two elementary schools was not acting as an agent of the school district and was therefore not a public entity.

[N.D.A.G. 2003-O-02](#)
February 21 2003

NONGOVERNMENTAL
ORGANIZATIONS
PUBLIC ENTITY

James River Senior Citizen's Center is a public entity subject to the open records law because it receives mill levy money for its general support without a specific contract with the county for specific services to be provided in exchange for the mill levy money. In addition, the senior center has the discretion to decide how the mill levy funds are spent within general areas that are outlined in statute. Except for information protected from public disclosure by other state laws, all records of the senior center regarding its use of the mill levy funds are open to the public.

[N.D.A.G. 2003-O-04](#)
February 25 2003

CITIES
COMPUTER RECORDS
FEES FOR ACCESS AND COPIES
RECORDS DEFINED
RECORDS RETENTION

E-mails contained on an electronic backup system are records in the possession of a public entity. Once an e-mail is deleted from a computer's electronic backup system, it is no longer in the possession of the public entity. A request for a copy of e-mails pertaining to specific identified individuals for a specific period of time is a request for a copy of specific public records. The city could charge \$25 per hour after the first hour for retrieving the e-mails of certain city officials from e-mails of all other city employees with which they are intermingled.

[N.D.A.G. 2003-O-06](#)
April 25 2003

COURTS
COURT RECORDS

The Disciplinary Board and the Judicial Conduct Commission are adjuncts of the Supreme Court. Therefore, records in their possession are records in the possession of the court and are not subject to the open records law.

[N.D.A.G. 2003-O-08](#)
July 22 2003

NONGOVERNMENTAL
ORGANIZATION
PUBLIC ENTITY
NOTICES
OPEN RECORDS, IN GENERAL

The Dakota Center for Independent Living is a public entity for purposes of the open records and meetings laws because it is recognized by state law (N.D.C.C. ch. 50-06.5) to exercise public authority and perform the governmental function of providing services to the disabled. The center is supported in whole or in part by public funds and expends public funds because the center decides how to use the fund it receives in a manner that resembles a legislative appropriation for general support of an agency or division of an agency, rather than a contract for services. A standing request for notice of meetings is valid (BUT SEE N.D.C.C. 44-04-20(5), amended in 2005). The public entity must be able to reasonably identify the records sought by the requestor. A request for "other communications with consumers" is overbroad.

[N.D.A.G. 2003-O-09](#)

August 27 2003

DENIAL OF RECORDS
UNREASONABLE DELAY
FEES FOR ACCESS AND COPIES
COMPUTER RECORDS

Records cannot be withheld pursuant to agency policy. If a public entity asks a requestor to explain a request in writing, the entity should advise the requestor that doing so is not a prerequisite to obtaining access to or a copy of the record, but only for clarification. The department determined within the first hour of searching its records, that it did not have a record in a form requested. The additional time for which it charged \$25 involved discussing the request and converting the data from certain electronic files to a text format by use of specialized software. Because the department was not required to create a record, it may not charge for that process. In addition, the \$25 fee may be charged only for an extended period of time locating data, not for the time it takes to put the data in a different format.

[N.D.A.G. 2003-O-10](#)

September 4 2003

NONGOVERNMENTAL AGENCY
ABUSE & NEGLECT
PUBLIC ENTITY
UNREASONABLE DELAY

Tri-County is a public entity for purposes of the open records law because it receives money for its general support from the Domestic Violence and Sexual Assault Prevention Fund, state general funds and county funds. As a public entity, all of Tri-County's recorded information regarding its public business must be open to the public upon request unless otherwise specifically provided by law. Except for the information regarding domestic and sexual assault clients and programs

protected from public disclosure under N.D.C.C. § 14-07.1-18, all recorded information of Tri-County regarding its use of the unrestricted funds received from the state and counties must be open to the public.

[N.D.A.G. 2003-O-11](#)
September 4 2003

TAX RECORDS
DISCLOSURE OF CLOSED OR CONFIDENTIAL
INFORMATION

Given the long-standing interpretation of the Tax Department of the provision of this manner, the Tax Department is reasonable to interpret N.D.C.C. § 57-39.2-23(1) to prohibit the divulging, in relation to any person, corporation, or limited liability company, the 1) business affairs, 2) operations, 3) or information obtained by an investigation. The act of entering into an agreement to collect, report, and remit sales and use taxes in North Dakota constitutes the “business affairs” or “operations” of a person or entity, and the release of the names of the companies entering into such agreements is prohibited by N.D.C.C. § 57-39.2-23. The Tax Department did not violate the law by refusing to disclose the names of 12 companies that have agreements with North Dakota under the Streamlined Sales Tax Project.

[N.D.A.G. 2003-O-17](#)
October 31 2003

UNREASONABLE DELAY
CITIES
ATTORNEY WORK PRODUCT

Taking a couple of months to respond to a records request was a violation of N.D.C.C. § 44-04-18. Once any litigation and adversarial administrative proceeding is completed, including exhaustion of all appellate remedies, the attorney work product must be available for public disclosure unless other exceptions apply.

[N.D.A.G. 2003-O-19](#)
November 12 2003

UNREASONABLE DELAY
OPEN RECORDS, IN GENERAL

A request for records made at a public meeting is a valid request for records. Even though the records were not available at the meeting, the records should have been made available as soon as possible after the meeting ended. A delay of four months in providing requested records was unreasonable and violated N.D.C.C. § 44-04-18.

[N.D.A.G. 2003-O-21](#)
December 1 2003

UNREASONABLE DELAY
OPEN RECORDS, IN GENERAL
DENIAL OF RECORDS

Five days was not unreasonable for the department to respond

to the records request because Ms. Olson had the documents, and the large volume of documents reviewed in order to find the requested record and the need to review the contents of the document with legal counsel. Public entities should not require request for records in writing under the pretext of clarification. The department failed to clarify that a written request was not a prerequisite to getting the record.

2004

[N.D.A.G. 2004-O-01](#)
January 2 2004

ECONOMIC DEVELOPMENT POSSESSION OF RECORDS

All financial institutions within the state of North Dakota, including the Bank of North Dakota, are prohibited from disclosing any customer information. N.D.C.C. § 6-08.1-03. As BND's governing body, the Industrial Commission is generally required to comply with the confidentiality requirements in N.D.C.C. § 6-09-35(1). Since the qualification requirements for a PACE loan are different than the qualification requirements for other loans, distinguishing entities that have obtained PACE loans would result in a release of commercial and financial information of a customer in violation of the confidentiality requirements of N.D.C.C. § 6-09-35(1). Since the requestor specifically requested only information on PACE loans, the Industrial Commission's response was accurate, and the Industrial Commission did not violate the open records laws with its response. The Department of Commerce does not have any records regarding PACE loans and, therefore, could not provide those records. In this case, the information requested regarding the North Dakota Development Fund is clearly commercial or financial information and is, therefore, confidential under N.D.C.C. 10-30.5-07.

[N.D.A.G. 2004-O-03](#)
January 20 2004

LAW ENFORCEMENT

A case is not active when the county state's attorney does not intend to move forward on the matter and no one knows if the suspect will ever return to this country. There must be a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. If the case is not "active" the criminal investigative information is open to the public.

[N.D.A.G. 2004-O-05](#)
February 17 2004

UNREASONABLE DELAY OPEN RECORDS, IN GENERAL MINUTES COUNTIES

A delay was reasonable when minutes had not been prepared at the time of the request; the minutes had to be transcribed; the secretary is a part time employee; and the commission sought records from other departments of Grand Forks County. Three working days after the open records request was submitted, the requestor was advised of the actions being taken in response to his request.

[N.D.A.G. 2004-O-06](#)
March 19 2004

DISCLOSURE OF CLOSED OR
CONFIDENTIAL RECORDS

The plain meaning of N.D.C.C. § 52-01-03(1) is that records maintained by Job Service for the administration of the unemployment compensation law are confidential and may be disclosed to a claimant only "to the extent necessary for the proper presentation of the claimant's claim" in a proceeding before Job Service. Since the records under N.D.C.C. § 52-01-03(1) are confidential records that may be disclosed to a claimant only in connection with a claim in a proceeding under the North Dakota unemployment compensation law. Job Service did not violate the open records law by failing to disclose those records.

[N.D.A.G. 2004-L-25](#)
April 1 2004

PUBLIC ENTITY
DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS
HIGHER EDUCATION
TRADE SECRETS
NONGOVERNMENTAL ORGANIZATIONS

Regardless of funding, an entity may also be subject to the open records laws if it is an agent of a public entity. Since the bookstore operated by Barnes & Noble is acting as an agent of the University of North Dakota, a public entity, the booklist created and maintained by the bookstore is subject to disclosure under the open records law unless a specific provision of the open records law exempts the booklist from disclosure. The booklist, a compilation of all the required textbooks and materials for courses at the University of North Dakota, is a trade secret and not subject to disclosure by Barnes & Noble. Neither a public entity nor its agent may by contract, rule, or policy make a record confidential unless the record comes within a specific exemption of the open records law.

[N.D.A.G. 2004-O-07](#)
April 6 2004

UNREASONABLE DELAY
FEES FOR ACCESS & COPIES
PRELIMINARY DRAFTS & WORKING PAPERS
SCHOOLS

Motions distributed and discussed at the school board meeting, are complete in themselves and are not protected as “working papers”. The school district should have provided access to or a copy of the motion immediately at its meeting. It took 12 days to send 6 documents, all of recent origin and related to the same general subject matter. No special circumstances that would justify a delay have been identified.

[N.D.A.G. 2004-O-10](#)
May 3 2004

EXECUTIVE SESSION,
RECORDS AND MINUTES

The recording of a closed portion of a meeting is a closed record and did not have to be released.

[N.D.A.G. 2004-O-11](#)
May 17 2004

SCHOOLS
DENIAL OF RECORDS
POSSESSION OF RECORDS

The request was for a preliminary budget document that did not exist and therefore did not have to be provided. While a denial of a request need not cite the specific legal authority for the denial, the legal reason for the denial must be described.

[N.D.A.G. 2004-O-13](#)
June 28 2004

EXECUTIVE SESSION,
RECORDINGS AND MINUTES

The district was not required to disclose a copy of the tape made of an executive session if the discussion in the executive session was limited to the topics announced in the open portion of the meeting.

[N.D.A.G. 2004-O-20](#)
September 7 2004

OPEN RECORDS, IN GENERAL
UNREASONABLE DELAY
FEES FOR ACCESS & COPIES
CITIES

The requestor had to ask four times for access to draft city ordinances, until the city finally told her they were located in the home of a council member. If existing records are not available when requested, a public entity has a duty under the open records law to provide access or copies of the records within a reasonable time. The fee for making copies should not be raised to punish or deter certain requestors.

[N.D.A.G. 2004-O-23](#)
October 27 2004

RECORD, DEFINED
DISCLOSURE OF CLOSED OR CONFIDENTIAL RECORDS
COUNTIES

Records in a county recorders office are open records unless otherwise provided by law. Marriage records are vital records kept in the recorder's office and are therefore open. Even

though the records contained social security numbers, a public entity may not deny a request for an open record because the record also contains confidential or closed information. The entity is required to redact or withhold the confidential information and disclose the rest of the record.

2005

[N.D.A.G. 2005-O-01](#)

January 10 2005

CITIES

UNREASONABLE DELAY

The parties had agreed upon a date for the requestor to review the ordinances. The city auditor knew she would not be available the afternoon of the agree-upon date, but she did not attempt to contact the requestor to make alternate arrangements, therefore, access was unreasonably delayed.

[N.D.A.G. 2005-O-05](#)

March 30 2005

COMPUTER RECORDS

FEES FOR ACCESS AND COPIES

HIGHER EDUCATION

UNREASONABLE DELAY

If a public entity chooses to narrow an open records request against the requestor's wishes, the requestor should not have to pay for charges that stem from narrowing the request. When a person requests a paper copy of an electronic record the document printed from the computer is the copy for which the person may be charged. The person should not be charged for duplicate copies made thereafter. When a public entity asks for estimated costs to be paid upfront, the entity should make sure the estimate is based on legally allowable charges. A copy of an electronically stored record must be provided at the requester's option. The duty to redact confidential information from some records is not a reason to refuse to provide any of the records in electronic form. NDSU added to the delay in providing the records by trying to limit the requestor's request and failing to investigate faster ways to provide the electronic records.

[N.D.A.G. 2005-O-06](#)

May 11 2005

OPEN RECORDS, IN GENERAL

TRADE SECRETS

A public entity may not withhold records on the basis that the information in its possession is preliminary and tentative. Any record that is responsive to the request must be provided. A request for a record cannot be denied because the records contain exempt or confidential information. The entity has a duty to redact the exempt or confidential information and

disclose the rest of the record. An agreement to maintain confidentiality is not valid, only a state or federal law can make a record exempt or confidential

[N.D.A.G. 2005-O-09](#)
May 27 2005

OPEN RECORDS, IN GENERAL
SCHOOLS
UNREASONABLE DELAY

A public entity may not require that an open records request be made in writing. It is a clear violation of the open records law to refuse to provide records for two and a half months because the requestor did not put the request in writing

[N.D.A.G. 2005-O-11](#)
June 27 2005

OPEN RECORD, IN GENERAL

A public entity does not have to provide records that do not exist. The Grand Forks Historical Commission provided the requestor with all the records that fulfilled the request that were in its possession.

[N.D.A.G. 2005-O-12](#)
June 28 2005

OPEN RECORDS, IN GENERAL

A public entity may not require proof of permanent residency prior to providing records to a requestor. It is also a violation to require that a request for records be made in person, before the board. The motive of the requestor is irrelevant and it is not up to the public entity to decide whether or not a request is meritorious.

[N.D.A.G. 2005-O-13](#)
August 10 2005

DISCLOSURE OF
CLOSED OR CONFIDENTIAL RECORDS

Each agency of a political subdivision is responsible only for the records in its possession and not for records that are in the possession of another agency of the same political subdivisions. Information in an evidence log is criminal intelligence information or criminal investigative information that, in the case of an active case, is exempt even if it contains information that was released pursuant to N.D.C.C. § 44-04-18.7(5), which contains a list of information that may be released to the public. A case is active if the prosecution is not complete (SEE ALSO N.D.A.G. 2004-O-03).

[N.D.A.G. 2005-O-16](#)
October 6 2005

CITIES
DENIAL OF RECORDS
OPEN RECORDS, IN GENERAL

Marking a record "confidential" is of no legal significance absent a state or federal law that expressly declares the record confidential. Whether the records only contained suggestions is irrelevant. If it concerned public business and was in the possession of a public entity, it is subject to the open records law.

2006

[2006-O-03](#)
February 14, 2006

PUBLIC ENTITY
DENIAL OF RECORDS
ATTORNEY CONSULTATION
EXECUTIVE SESSION, PERSONNEL MATTERS

An organization, such as the Red River Valley Fair Association, that is a public entity both because it is supported by public funds and because it is recognized under state law to exercise a public function cannot exempt personnel records under N.D.C.C. § 44-04-18.1(3). Therefore, applications for a new fair manager were not exempt records and had to be provided to the requestor. In addition, it was improper for the Red River Fair Association's Search Committee to use N.D.C.C. § 44-04-18.1(3) to go into executive session at its February 8, 2006 meeting to review job applications. The mere presence of the attorney for the Fair Association at the executive session was not sufficient to close the meeting under "attorney consultation."